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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 1



GEORGIA L. EVERETT, PLAINTIFF IN ERROR,

vs.

EDWARD EVERETT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MARCH 18, 1907.

(20,615.)

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a In the Court of Appeals of the State of New York.

GEORGIA L. EVERETT, Plaintiff-Respondent,
vs.
EDWARD EVERETT, Defendant-Appellant.

Case on Appeal.

W. H. Van Steenbergh, Attorney for the Plaintiff-Respondent, 10 Wall Street, New York.
Zabriskie, Burrill & Murray, Attorneys for Defendant-Appellant, 49 Wall Street, New York.

1 Supreme Court, Appellate Division, Second Department.

GEORGIA L. EVERETT, Respondent,
against
EDWARD EVERETT, Appellant.

Statement under Rule 41.

This action was commenced by the service without the State on April first, 1897, of the summons and complaint with a copy of the order of publication and affidavit upon the defendant Edward Everett, personally, at Boston, Mass.

The amended complaint upon which this trial was had was served on March 27th, 1900, and a statement in amplification of said amended complaint was served on June 27th, 1900. The amended answer to the amended complaint upon which this trial was had was served upon November 23d, 1900.

A reply to the original answer was served on November seventh, 1900, and by stipulation it was agreed that the said reply should stand as if served on November 27th, 1900, as and for a reply to the amended answer.

The name of the plaintiff is Georgia L. Everett; the name of the defendant is Edward Everett; there has been no change of parties or attorneys since the beginning of the action.

2 Supreme Court, County of Kings.

Trial Desired in the County of Kings.

GEORGIA L. EVERETT,
against
EDWARD EVERETT, Defendant.

Summons.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney

within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated March 20th, 1897.

W. H. VAN STEENBERGH,
Plaintiff's Attorney.

Office and Post-office address, No. 10 Wall Street, New York City.

To Edward Everett, Defendant:

The foregoing summons is served upon you without the State of New York, pursuant to an order of the Hon. Augustus Van Wyck, one of the Justices of the Supreme Court of the State of New York, dated the 27th day of March, 1897, and filed with the complaint in the Clerk's office of the County of Kings, City of Brooklyn, Kings County, New York.

Dated March 27th, 1897.

Yours, etc.

W. H. VAN STEENBERGH,
Plaintiff's Attorney.

Office and Post-office address, 10 Wall Street, New York, N. Y.

3 Supreme Court, Kings County.

GEORGIA L. EVERETT,
against
EDWARD EVERETT, Defendant.

The plaintiff, for her amended complaint, respectfully shows to this Court:

First. That the plaintiff is a resident of the City of Brooklyn, County of Kings and State of New York.

That on the 30th day of October, 1884, the plaintiff was married to the defendant herein at the City of Brooklyn, Kings County, by John Courtney, Justice of the Peace of the said City of Brooklyn and County of Kings.

That from that time down to and including the 1st day of June, 1891, the plaintiff and the defendant lived and cohabited together as husband and wife.

Second. The plaintiff further alleges that no issue have been born or begotten between this plaintiff and the said defendant.

Third. That in and about the year 1887 the defendant (with fraudulent intent and for the purpose of misleading and deceiving plaintiff) stated and represented to the plaintiff that his family (meaning the defendant's family) would never recognize a marriage by a Justice of the Peace, referring to the marriage ceremony performed by the said John Courtney, Esq., which took place at said City of Brooklyn, on said 30th day of October, 1884; that a

4 ceremonial marriage would have to take place before a minister of the Gospel. That the defendant thereupon stated and

represented to the plaintiff that it would be necessary to have the marriage ceremony theretofore performed by said Justice of the Peace annulled and set aside; and that, after that had been done, he (defendant) would have a ceremonial marriage performed by a regularly ordained minister of the gospel.

Fourth. That the defendant (with like fraudulent intent) also stated and represented to the plaintiff at the same time that the proceedings to annul said marriage would be merely formal in character; that the plaintiff need not give the same any attention whatever, and that he (defendant) would look after all of the details thereof. That it would not be necessary for her to peruse any papers which might be served on her; neither would it be necessary for her to engage the services of counsel t[illegible]present her in such proceedings.

Fifth. That subsequently, as this plaintiff is informed and believes, proceedings were instituted in the Supreme Court of the State of New York, held in and for the County of Kings, the purpose and object of which were to have the said marriage contract between the plaintiff and defendant declared void and the marriage between them annulled.

Sixth. That the plaintiff, relying solely upon the statements and representations so, as aforesaid, made by the defendant, and believing the same in all respects to be true, did not employ counsel to represent her in such proceedings, and paid no attention whatever thereto, which were, as she has subsequently learned, instituted on or about the 17th day of December, 1887.

Seventh. That this plaintiff had on said 17th day of December 1887, and has now, a good and substantial defense on the merits to the cause of action set forth in said plaintiff's (now defendant's) complaint in the action instituted on said 17th day of December, 1897, and to each and every part thereof.

That in the year 1879, when plaintiff was about sixteen years of age, she went with one William G. Morrison to a social gathering, and while there it was proposed in a spirit of fun that a marriage ceremony should be performed; that thereupon the plaintiff "stood up" with said William G. Morrison, and one of the parties present went through the form of a marriage ceremony; that such ceremony was a sham ceremony; that whatever the plaintiff and the said Morrison did they did in the spirit of fun and without the intention of becoming married, and the person who performed such ceremony had no authority under the laws of the State of Rhode Island to perform such a ceremony; that the alleged ceremony took place at the City of Providence, in the State of Rhode Island; that at the time it is alleged to have taken place this plaintiff was a minor and under the age of sixteen years; that within an hour after the ceremony was performed the plaintiff returned to her home in Boston, and nothing further was heard of the alleged marriage until some two months thereafter, when the said Morrison called on the plaintiff's parents and claimed that the marriage was a valid one; that the said Morrison urged his claim with such persistency that the plaintiff went to live with him in the City of Boston, Massachusetts,

and lived with him for a period of six months, but left him before she reached the age of seventeen years; that at the time the alleged ceremony is said to have taken place no consent of the parents or guardians of the plaintiff to the so-called marriage had been obtained, no license had been procurred as required by law and no record of the alleged marriage was ever made in the office of the County Clerk of the County where the ceremony is alleged to have taken place. That the alleged marriage between the said Morrison and this plaintiff was not recognized by the laws of the State
6 of Rhode Island and was null and void. That the defendant herein prior to the marriage between himself and this plaintiff took the steps necessary to ascertain and determine whether there had been a lawful and valid marriage between this plaintiff and the said Morrison and this plaintiff alleges the fact to be that the defendant herein became satisfied that no valid marriage had ever taken place between the plaintiff and the said Morrison.

And plaintiff further alleges, upon information and belief, that all of the facts relating to the illegality and invalidity of the so-called marriage of Morrison were known to this defendant on said 17th day of December, 1887.

Eighth. Upon information and belief, that such proceedings were thereafter had as resulted in defendant's obtaining a judgment and decree of this Court declaring the marriage contract between the plaintiff and this defendant void, and annulling the said marriage.

Ninth. The plaintiff is informed and believes that said judgment and decree so obtained, as aforesaid, was entered in the Clerk's Office of the County of Kings on or about the 9th day of April, 1888.

Tenth. That, immediately upon being advised that the marriage between the defendant and the plaintiff had been annulled, she (plaintiff) demanded of the defendant that a ceremonial marriage be at once performed by a minister of the gospel as he had agreed and promised to do.

Eleventh. That the plaintiff and the defendant continued to live together for a period of three years, down to and until the first day of June, 1891.

Twelfth. That no ceremonial marriage was ever performd, although during the entire period of said three years he repeated and reiterated his promises to have the same performed.

7 Thirteenth. That the plaintiff alleges and charges the fact to be that the defendant was guilty of fraud and deceit in the procurement of the decree of judgment of this Court declaring the marriage contract between the plaintiff and the defendant void and annulling said marriage, and that whatever was done by him in obtaining and procuring the same was the result of the fraud, imposition and deceit practiced by the defendant upon this plaintiff, and was the result of a fraudulent plan, scheme or conspiracy on his part.

Wherefore, the plaintiff, by reason of the premises, demands the judgment of this Court, as follows:

First. That it be adjudged and decreed that the judgment or de-

cree of this Court of April the 9th, 1888, be annulled, and in all respects vacated and set aside.

Second. That it be further adjudged and decreed that the marriage contract heretofore made between the plaintiff and the defendant is still binding, and that the marriage between this plaintiff and the defendant is still in full force and effect.

Third. That it be adjudged and decreed that the plaintiff recover of the defendant herein the costs and disbursements of this action.

Fourth. And that the plaintiff have such further and other relief in the premises as may be just and equitable.

W. H. VAN STEENBERGH,
Plaintiff's Attorney.

Office and Post-office address, 10 Wall St., Borough of Manhattan, New York.

8 COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk:

Georgia L. Everett, being duly sworn, says that she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

GEORGIA L. EVERETT.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *May* 4, 1900.

Subscribed and sworn to before me on this — day of ——.

[L. S.] GEORGE A. PERKINS,
Notary Public.

(Certificate as to capacity of notary attached.)

9 Supreme Court, Kings County.

GEORGIA L. EVERETT, Plaintiff,
against
EDWARD EVERETT, Defendant.

Pursuant to the defendant's notice herein bearing date May 19th, 1900, the plaintiff, by way of an amended statement, states:

First. In the month of June, 1879, in the City of Providence, the "mock marriage" ceremony between the plaintiff and William G. Morrison, referred to in the seventh paragraph of the amended complaint, took place.

Second. Plaintiff is unable to state the name of the person in said seventh paragraph who is alleged to have gone through the form of the "mock marriage," but to the best of her knowledge and belief it was a person by the name of Taylor.

Third. The plaintiff was under the age of seventeen years at the time the said ceremony is alleged to have taken place, and was born in Scotland, Massachusetts, January 3d, 1863.

Fourth. The plaintiff went to live with the said Morrison in the autumn following the said marriage ceremony, the precise time she is not advised, and continued to live with him for a period of six months when she lived with him.

Fifth. The plaintiff advised the defendant of the so-called "mock marriage" to Morrison, whereupon the defendant took the
10 plaintiff to one William G. Roelker, his attorney, then residing in the State of Rhode Island, and requested the said Roelker to investigate the same, and the plaintiff was subsequently advised that the said Roelker, after having made an investigation, stated that no record of the marriage was to be found. That thereafter the defendant caused the said Morrison to execute a paper to the effect that there was no marriage existing between the plaintiff and the said Morrison.

Sixth. Plaintiff and the defendant lived in a cottage with the plaintiff's parents at Beachmont, Massachusetts, for a period of one year; they lived with the plaintiff's parents at No. 23 West Cedar Street, Boston, Massachusetts; temporarily sojourned in the City of Brooklyn; also at the City of Pittsfield, Massachusetts; at Hartford, Connecticut, for a period of three months in the year 1891, and also for a short time at Cooperstown, New York.

Plaintiff states as to their sojourn at Pittsfield, Massachusetts, both the plaintiff and the defendant stayed at the same house, but they were not known to be married and they did not occupy the same room and the marriage had not been acknowledged. This is also true as to their sojourn at Hartford, Connecticut.

Seventh. The defendant, during their several sojourns at hotels in the City of New York and elsewhere, always registered in a name other than his own.

Dated June 16th, 1900.

W. H. VAN STEENBERGH,
Attorney for Plaintiff.

Office and Post-office Address, 10 Wall Street, Borough of Manhattan, New York.

To Zabriskie, Burrill & Murray, Esqs., Attorneys for Defendant.

11 STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Georgia L. Everett, being duly sworn, says that the foregoing statement by her subscribed is true.

GEORGIA L. EVERETT.

Sworn to before me this 22d day of June, 1900.

GEORGE H. RUSS,
Notary Public.

(Certificate of Clerk attached.)

Supreme Court, County of Kings.

GEORGIE L. EVERETT
against
EDWARD EVERETT.

Amended Answer.

The above-named defendant, by Zabriskie, Burrill & Murray, his attorneys, answering the plaintiff's amended complaint, respectfully shows to the Court, as follows:

First. This defendant has no knowledge or information sufficient to form a belief whether or not the plaintiff is a resident of the City of Brooklyn, County of Kings and State of New York.

He admits that he was married to her October 30, 1884, at the City of Brooklyn, Kings County, by John Courtney, Justice of the Peace of the City of Brooklyn and County of Kings, and that no issue have been born or begotten between the plaintiff and this defendant.

12 He denies that from the time of the said marriage down to and including June 1, 1891, plaintiff and this defendant lived and cohabited together as husband and wife. He alleges that they have never lived together as husband and wife, or otherwise.

Second. This defendant denies that in or about the year 1887, or at any time, either with reference to the said marriage ceremony performed by the said Courtney or otherwise, he stated or represented to the plaintiff that his family would never recognize a marriage by a Justice of the Peace; or that a ceremonial marriage would have to take place before a minister of the gospel, or that upon or after such statement or the statement in that behalf alleged in the complaint, he stated or represented to the plaintiff that it would be necessary to have the marriage ceremony performed by said Justice of the Peace annulled or set aside. He denies that he stated or represented or promised that after the said marriage ceremony, or the said marriage between him and the plaintiff should have been annulled or set aside, or at any time or under any conditions or circumstances whatever, he would have a ceremonial marriage performed by a regularly ordained minister of the Gospel, or that he would marry the plaintiff in any manner or form or at all.

He denies that at the time referred to in the complaint or at any time, he stated or represented to the plaintiff that the proceedings to annul the said marriage would be merely formal in character, or that the plaintiff need not give the same any attention, or that he would look after all or any of the details thereof, or that it would not be necessary for her to peruse any papers which might be served on her, or that it would not be necessary for her to engage the services of counsel to represent her in such or any proceedings.

This defendant has no knowledge or information sufficient to form a belief whether or not the plaintiff employed counsel to repre-

sent her in the proceedings in the complaint referred to, but
13 he admits that she was not represented by counsel in the proceedings referred to in the fifth paragraph of the complaint, and which were instituted on or about December 17, 1887. He denies, however, that she paid no attention to the said proceedings: on the contrary, she was well informed of them, and paid careful attention to them, and knew the steps that were taken therein from time to time. He denies that the plaintiff relied upon the supposed statements or representations alleged in the third, fourth, sixth, tenth, twelfth and thirteenth paragraphs of the amended complaint, to have been made by him, and denies that the plaintiff believed the said supposed statements or representations, or any of them, to be true, and denies that he ever made them or any of them.

This defendant denies that immediately upon being advised that the marriage between him and the plaintiff had been annulled, or at any time, the plaintiff demanded of him that a ceremonial or other marriage be at once, or at any time, performed by a minister of the gospel or otherwise, or that he then or prior thereto or ever had agreed or promised to have such ceremonial or other marriage performed.

This defendant denies that after the said marriage between him and the plaintiff had been annulled, he and the plaintiff continued to live together, or lived together, for a period of three years down to and until June 1, 1891, or at any time or place, or for any period. He admits that no ceremonial or other marriage was ever performed or took place between himself and the plaintiff except the marriage performed by Courtney, as aforesaid. He denies that during the period of three years referred to in the eleventh and twelfth paragraphs of the complaint, or at any time, he promised, or repeated or reiterated promises, to have a ceremonial marriage or other marriage performed, or in anywise to marry the plaintiff.

Third. This defendant admits that on or about December 17,
14 1887, instituted an action in the Supreme Court of the State of New York held in and for the County of Kings, the purpose and object of which were to have the said marriage contract between him and the plaintiff in the fifth paragraph of the amended complaint referred to annulled, and that such proceedings were thereafter had therein as resulted in this court rendering its judgment and decree declaring the marriage contract between this defendant and the plaintiff void and annulling the said marriage, and that the said judgment and decree was entered in the Clerk's Office of the County of Kings on or about April 9, 1888, to wit, on April 4, 1888, of which day it bears date.

This defendant has no knowledge or information sufficient to form a belief as to any of the allegations contained in the seventh paragraph of the amended complaint, except the allegation that the plaintiff herein had on December 17, 1887, and has now, a good and substantial defense on the merits to the cause of action set forth in this defendant's complaint in said action instituted December 17, 1887, and to each and every part thereof; which allegation, and every part thereof, this defendant, on information and belief, de-

nies; and except the further allegation that this defendant, prior to the marriage between himself and the plaintiff herein took the steps necessary to ascertain and determine whether there had been a lawful and valid marriage between the plaintiff herein and William G. Morrison in the said paragraph referred to; which allegation this defendant denies, and in regard to the said allegation he further says that prior to his marriage with this plaintiff he did not know, and never had heard, that she had been married to the said Morrison, or was or ever had been the said Morrison's wife; and except the allegation that this defendant became satisfied that no valid marriage had ever taken place between the plaintiff and the said Morrison; which allegation this defendant denies; and except the allegation that all of the facts relating to the illegality and invalidity of the so-called marriage of Morrison were known to this defendant on December 17, 1887; which allegation this de-
15 fendant denies; and he further says that he has not, nor ever had, any knowledge, information, or belief that the plaintiff's marriage with said Morrison was illegal or invalid, but that, on the contrary, to the best of his knowledge, information and belief, the said marriage between the plaintiff and Morrison was and is legal and valid; and that prior to the motion hereinafter referred to, made by the plaintiff herein to vacate the said judgment, the plaintiff never claimed or pretended that her marriage with Morrison was not legal and valid.

Fourth. This defendant denies each and every allegation in the thirteenth paragraph of the amended complaint contained, and each and every allegation in the said complaint which charges him with fraud or deceit or misrepresentation in the procurement of the said decree or judgment of this Court declaring the marriage between him and the plaintiff void and annulling the same; and he denies that anything done by him in obtaining or procuring the said judgment, or in the course of the said action, or prior to the commencement thereof, or anything done or said by him to the plaintiff or to any other person, was done for the purpose of misleading or imposing upon the plaintiff or taking any advantage of her or inducing her to forbear to defend the said action, or to neglect to assert or to relinquish any rights or defenses she might or could have asserted or exercised; and he denies all the allegations of fraud, imposition or deceit in the said complaint amended.

This defendant denies all the allegations of the complaint not already hereinbefore expressly answered.

Fifth. For a second and further defense this defendant repeats all the allegations hereinbefore contained, and further alleges that on or about December 17, 1887, he commenced an action in this Court in Kings County against the plaintiff herein. The said action
16 was entitled "Edward Everett, plaintiff, against Georgie L. Morrison, sometimes called Georgie L. Everett, defendant." By his complaint therein this defendant alleges as follows:

"That the defendant is a resident of the County of Kings and State of New York. That on the 30th day of October, 1884, at the City of Brooklyn, County of Kings and State of New York, the

plaintiff was married to the defendant herein. That at the time of said marriage said defendant was the wife of one Wiliam G. Morrison, who was at that time, and is now, living, and the marriage of said defendant with said William G. Morrison was then in force. The plaintiff further alleges that the said marriage between him and the defendant therein was entered into by him in good faith and without any knowledge on his part of the said former marriage between the defendant and the said William G. Morrison. That no issue have been born or begotten of the marriage between this plaintiff and the said defendant. Wherefore, plaintiff prays that a judgment of this Court be granted to him declaring said marriage contract between him and said defendant void, and annulling said marriage between him and said defendant, and that plaintiff have such other and further relief as may be just and proper." This defendant duly swore to the truth of said complaint. The summons and a copy of the said complaint were personally served on the defendant therein (the plaintiff herein) December 17, 1887, in the City of Brooklyn, County of Kings. The said defendant (the plaintiff herein) did not appear in the said action either in person or by attorney, and interposed no answer or demurrer to the complaint, and after the expiration of twenty days from the time of the service of the said summons and complaint upon her, an order was duly made by one of the Justices of this Court, at a Special Term thereof, January 20, 1888, whereby, among other things, it was referred to Almet F. Jenks, Esq., counselor at law, to take proof of the facts charged in the complaint in the said action, and to report the same to this Court with all convenient speed and to certify to the Court the testimony and other proceedings upon the reference, with
17 his report. Such proceedings were thereafter duly had before the said Referee that he took proof of the facts charged in the said complaint and reported the same to the Court and certified to the Court the testimony and other proceedings upon the reference, with his report dated March 6, 1888. Thereupon such further proceedings were duly had that a judgment of this Court was duly rendered April 4, 1888, and filed in the office of the Clerk of Kings County whereby, which is the same judgment hereinbefore and in the amended complaint referred to, among other things, the Court found and decided that on October 30, 1884, in the City of Brooklyn, County of Kings and State of New York, the plaintiff was married to the defendant; that on or about June 10, 1878, the defendant (plaintiff herein) was married to one William G. Morrison, who was still living, and at the time of the said marriage between the plaintiff and the defendant, the defendant (plaintiff herein) was, and still was, the wife of said Morrison and that her marriage with said Morrison was, at the time of the said marriage between the plaintiff (this defendant) and the defendant (plaintiff herein) and was then, in full force and effect, and no valid contract of marriage had been entered into between the plaintiff (this defendant, and the defendant (plaintiff herein); that the said marriage between the plaintiff and the defendant was entered into by said plaintiff (this defendant) in good faith and without knowl-

edge on his part of the former and existing marriage of the said defendant (plaintiff herein) and William G. Morrison; and it was further adjudged that no valid contract of marriage had been entered into between the plaintiff (this defendant) and the defendant (plaintiff herein), and that the marriage contract entered into between them October 30, 1884, was void, and that the said marriage be, and the same by the said judgment was, annulled.

The said judgment remains of record, as aforesaid, in full force and unreversed; and for greater certainty this defendant refers to the said record now ready to be produced.

18 Sixth. For a third and further defense this defendant repeats all the allegations hereinbefore contained; and further shows that on or about May 27, 1892, the plaintiff herein caused to be served upon the attorney for this defendant in the action hereinbefore and in the amended complaint referred to brought by him in this Court in Kings County against the plaintiff herein for the purpose of having the marriage between him and this plaintiff annulled, and in which judgment was rendered annulling the same April 4, 1888, a notice of motion and affidavits, and in the said notice the plaintiff herein stated upon the said affidavits and on the pleadings and proceedings in said action, she would move this Court at a time and place therein mentioned, for an order that the same judgment annulling the marriage between the plaintiff and defendant in said action, namely, between this defendant as plaintiff, and the said plaintiff herein as defendant, be vacated and set aside, and that the said defendant (plaintiff herein) be permitted to come in and defend the said action, and for such other and further relief as may be just. The plaintiff herein moved upon her own affidavit which was sworn to May 13, 1892, and upon the affidavits of other persons, and in her said affidavit she alleged, in substance, the same things which in the amended complaint in this action she has alleged and in particular she alleged therein that her marriage with William G. Morrison was performed in a spirit of fun at a social gathering and was not a legal or valid marriage; that prior to her marriage with this defendant she told him of her marriage with Morrison; that this defendant engaged a lawyer to procure for her (plaintiff herein) a divorce from the said Morrison; that the said proceeding was abandoned for the reason that no valid marriage had ever taken place between her and the said Morrison. She further charged that about the year 1887 this defendant stated to her that his family would never recognize a marriage by a Justice of the Peace and that they should have to go through a ceremonial marriage before a minister of the Gospel; that this defendant

19 stated that for that purpose it would be necessary to have the marriage ceremony which was performed by the said Justice of the Peace annulled and set aside, after which she charged that this defendant promised that he would have a ceremonial marriage performed by a minister of the gospel. She further charged in her said affidavit that this defendant stated to her that the annulling of the said marriage was merely a formal proceeding and that she need not trouble herself about the matter as he (this defendant) would

attend to all the details; that it was not necessary for her to read any of the papers, and that when papers were handed to her by the plaintiff's attorneys, to destroy them; and that it was not necessary to engage counsel, and that she did not have counsel on the hearing. In her said affidavit she referred to the proceedings before the Referee appointed to take proof of the facts charged in the complaint in the said action, and to the other proceedings in the case, and further charged that after the decree of annullment was entered she and this defendant lived together as man and wife for a period of three years until June 1, 1891; that this defendant supported her and nearly every month during the said three years reiterated his promise to have said ceremonial marriage performed. In substance and effect the same allegations were made in the said affidavit which the plaintiff herein has made in her amended complaint.

This defendant, answering the said affidavit, among other things, denied that the plaintiff herein had told him of her marriage with Morrison prior to her marriage with himself, and denied that he had known anything about it; and denied that her marriage with Morrison was illegal or invalid, or that this defendant, before his marriage with the plaintiff, or at any time, had engaged a lawyer to procure a decree of divorce for the plaintiff herein from the said Morrison, or that the said proceeding was abandoned for the reason that no valid marriage had ever taken place between the said Morrison and the plaintiff herein, and denied the several allegations of fraud in said affidavit contained and hereinbefore mentioned, and denied that he had made the said alleged statements or representations in regard to the suit to annul the said marriage between him and this plaintiff, or that he had promised thereafter to marry this plaintiff, or that he had lived with this plaintiff as man and wife after the annullment of the said marriage.

Beside the affidavits of this defendant and the plaintiff herein other affidavits were read to the Court on the part of the plaintiff herein in support of her motion and on the part of this defendant in opposition thereto, and the record of the judgment aforesaid, and of the proceedings of the said suit, was read to the Court, and the cause was heard and considered by the Court on the merits, and such proceedings were duly had that an order was made by this Court at Special Term, July 21, 1892, whereby the said motion of the plaintiff herein was granted, and it was ordered that the said judgment annulling the marriage between this defendant and the plaintiff herein be vacated and set aside, and that the defendant therein (the plaintiff herein) have leave to serve an answer to the complaint in the said action within twenty days after the entry of said order, and that the plaintiff (this defendant) have leave to reply or demur thereto or to make such motion as he may be advised, and that either party have leave to bring on for trial the issues which should be so joined; but, if such answer be not served, as aforesaid, then that the order should be null and void, and the said judgment theretofore entered in the said action should remain in full force and effect.

Thereafter this defendant appealed from the said order to the

General Term of this Court for the Second Judicial Department, and such proceedings were duly had that the appeal was argued and the cause was heard and considered by the said General Term upon the merits, and thereupon the said General Term, by its order dated December 13, 1892, reversed the said order made at Special Term July 21, 1892, and denied the motion of the defendant in the said action (plaintiff herein); that the said judgment in said
21 action be vacated, and that she have leave to come in and defend the same.

Thereafter said defendant in the said action (the plaintiff herein) made a motion before the said General Term of this Court for the Second Judicial Department for leave to re-argue said appeal, which motion was denied by an order of the said General Term dated May 10, 1893.

The said order of the said General Term made December 13, 1892, remains unreversed and in full force and effect.

For greater certainty this defendant refers to the said order of the General Term and the record thereof, and the proceedings upon which the same was made, and to the said order of the General Term made May 10, denying the motion of the plaintiff herein for a re-argument, all of which are now here ready to be produced.

Seventh. For a fourth and separate defense this defendant repeats all the allegations hereinbefore contained and alleges that the plaintiff herein was conversant with all the proceedings in the said action commenced by this defendant against her December 17, 1887, and hereinbefore and in the amended complaint referred to, when, and as from time to time, they were taken. She knew what the purpose and object of the action were, and she knew of the judgment therein at or immediately after the time it was rendered, and a copy thereof was duly served upon her. She then had, and ever since has had, all the knowledge and information which she had at the commencement of this action, or which she sets forth in the amended complaint, in regard to the supposed facts in the seventh and other paragraphs of the amended complaint alleged—but this defendant does not admit that the said supposed facts are true—as constituting her defense against this defendant's complaint in the said nullity action. At all times since, and up to the commencement of this action, she both had means of knowledge, and actually knew all that was done
22 by this defendant and by the Court in the said action and the proceedings therein. During all the same time she had means of knowledge, and actually knew, all the supposed acts and things in the complaint alleged to have been done or omitted to be done by this defendant, and all the supposed statements and representations therein alleged to have been made by this defendant—but this defendant denies that he made the statements, representations or promises in the amended complaint in that behalf alleged and denies that he is guilty of the supposed fraud, imposition or deceit in the amended complaint charged against him. The plaintiff herein has acquiesced in the said judgment from the time it was rendered until the commencement of this action, without taking any steps to open it, or vacate or set it aside, save and except her application to the

Court for that purpose hereinbefore and in the sixth paragraph of this answer referred to and ever since the said motion was denied, the plaintiff herein has submitted to the said judgment and acquiesced therein; and she is barred by her own negligence, laches and acquiescence from maintaining this action.

Eighth. For a fifth and separate defense this defendant repeats all the allegations hereinbefore contained and further alleges that he is, and all his life has been a resident of Boston, in the County of Suffolk, in the State of Massachusetts, and that on or about February 21, 1895, the plaintiff herein commenced a suit against this defendant in the Probate Court for the said County and State, the same being under the laws of Massachusetts a court of competent jurisdiction in that behalf, and by her petition alleged that she was a resident of Boston aforesaid, and that she was the lawful wife of this defendant, and that her said husband, meaning this defendant, failed, without just cause, to furnish suitable support for her and had deserted her, and that she was living apart from her said husband, meaning this defendant for justifiable cause; and she prayed that the said Court would make such order as it deemed expedient concerning her
23 support. Process was duly issued out of the said Court and served upon this defendant and he duly appeared. On or about March 21, 1895, on motion of this defendant, the Court ordered the said plaintiff to file full specifications as to how, when and where she became the lawful wife of this defendant. Pursuant to the said order, and on or about April 1, 1895, the said plaintiff filed in the said Court her specifications wherein she stated that she was married to this defendant on or about October 31, 1884, in Brooklyn, New York, by John Courtney, Esq., Justice of the Peace, and further that a legal marriage according to the laws of the State of New York was entered into in that State between her and this defendant on or about April 15, 1888, by mutual consent and consummation and acknowledgment and cohabitation in that State, and that such consent, acknowledgment and cohabitation continued in that State, and also in the Commonwealth of Massachusetts, from April 15, 1888, to May 30, 1891, at which time, she alleged, this defendant deserted her; and she further stated that her marriage with this defendant was still—to wit, on April 1, 1895—of legal force and effect. She further stated that this defendant deserted her on or about May 30, 1891, and had contributed nothing to her support since that time. Thereafter this defendant, according to the course and practice of the said Court, duly answered the said petition, and admitted that he and the said petitioner were married on or about October 30, 1884, in Brooklyn, by John Courtney, Esq., Justice of the Peace, and alleged that the said marriage had been duly adjudged to be null and void by this Court by its judgment rendered April 4, 1888, in the suit brought by this defendant against the plaintiff herein for the purpose of having the said marriage annulled, which is the same judgment hereinbefore in this answer, and also in the amended complaint herein, referred to. In respect to the supposed marriage between this defendant and the plaintiff herein, alleged in the said

specifications filed by the plaintiff in her said suit in the
24 Probate Court to have taken place on or about April 15, 1888, this defendant answered that at the time of the said marriage performed on or about October 30, 1884, by John Courtney, Justice of the Peace, and both at the time of the alleged marriage stated in the specifications, filed by the said plaintiff, to have taken place April 15, 1888, and at all other times subsequent to, as well as long before October 30, 1884, the said plaintiff was the wife of one William G. Morrison, and that by reason thereof the said supposed marriages between this defendant and the said plaintiff by her alleged, were, and each of them was, null and void.

Thereafter such proceedings were duly had that the said cause came on to be heard and was heard by the said Probate Court upon the issues raised as aforesaid upon this defendant's said answer to the plaintiff's said petition, and the said Court found the said issues for this defendant, and thereupon made its decree March 25, 1897, whereby the Court found and decided that the prayer of the plaintiff's said petition should not be granted and adjudged that the said petition be dismissed; and that the said judgment remains of record, and in full force and effect. All of which will more fully and at large appear by the record of the said judgment now ready to be produced.

Ninth. For a sixth and separate defense, this defendant alleges, that the plaintiff has a full, adequate and complete remedy at law, by action for damages for the supposed wrong and injury alleged in the complaint, and that she ought not to have or maintain this action.

Wherefore this defendant prays that the plaintiff's complaint be dismissed with costs, and that he have such other and further relief as he may be entitled to.

ZABRISKIE, BURRILL & MURRAY,
Attorneys for Defendant, 21 Broad Street,
Borough of Manhattan, City of New York.

25 STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Edward Everett, being duly sworn, deposes and says, that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

EDWARD EVERETT.

Sworn to before me this 20th day of November, 1900.

[SEAL.] JOHN O. SHAW, JR.,
Notary Public.

Certificate of Notary attached.

Supreme Court, County of Kings.

GEORGIA L. EVERETT, Plaintiff,
against
EDWARD EVERETT, Defendant.

Reply.

The plaintiff, replying to the answer of the defendant herein, alleges as follows:

First. That she is at present, and has been for some time, and was at the time this action was commenced, a resident of the City of Brooklyn, County of Kings, State of New York. She further states that she was married to said Edward Everett October 30th,
26 1884, at the City of Brooklyn, County of Kings, by John Courtney, Justice of the Peace, City of Brooklyn, County of Kings, and that no issue have been born or begotten between said plaintiff and defendant. The plaintiff further answers and says that from the time of said marriage and down to and including June 1st, 1891, the plaintiff and defendant lived and cohabited together as husband and wife at No. 23 West Cedar street, Boston, at New York City, Brooklyn, Cooperstown, N. Y., and at different other places as husband and wife.

Second. That in or about the year 1887, and at divers other times, the defendant falsely represented with reference to said marriage ceremony performed by said Courtney that his family, especially his mother, would never recognize a marriage by a Justice of the Peace, and that a ceremonial marriage would have to take place before a minister of the Gospel, and that on or after such statement, he falsely stated and represented to the plaintiff that it would be necessary to have the marriage ceremony performed by said Justice of the Peace, annulled and set aside, before a ceremonial marriage could take place. The defendant further stated, represented or promised, that after said marriage ceremony, or the said marriage between him and the plaintiff should have been annulled or set aside, that he would have a ceremonial marriage performed by a regularly ordained minister of the Gospel, and that he would marry the plaintiff in due manner and form. The plaintiff says that the defendant falsely and fraudulently represented and stated to her that the proceedings to annul the marriage would be merely formal in character, and that the plaintiff need not give the same any attention, and that he would look after all the details thereof, and that it would not be necessary for her to peruse any papers which might be served on her, and that it would not be necessary for her to engage the services of counsel to represent her in such or any proceedings, and the plaintiff says, that she did not understand the nature
27 of the proceedings, that they amounted to a complete and absolute separation, but that she believed they were simply a formal proceeding necessary to be taken preliminary to the solemnization of the marriage before a minister of the Gospel. And the

plaintiff further says that relying upon the false and fraudulent representations of the defendant, she believed the matter to be purely formal, and did not contemplate an absolute separation, that she took no steps to be represented by counsel or otherwise in said proceedings, and that further relying upon said representations, the only counsel she saw in the matter was the defendant's own attorney, who she saw at the request of the defendant; and that she was not represented at the proceedings, and had no legal advice or counsel for the same, for the reasons above stated. That she was not well informed of them, but relied wholly upon the representations of the defendant; and the plaintiff further states that she relied wholly upon the statement and representations alleged in the third, fourth, sixth, tenth and thirteenth paragraphs of the amended complaint, and that they were made at the time, and that the plaintiff believed said statements and representations to be true.

The plaintiff further says that upon being advised that the marriage between her and the defendant had been annulled, and at other time subsequent thereto, the plaintiff demanded of the defendant that a ceremonial or other marriage be at once performed by a minister of the Gospel, and the plaintiff says that the defendant promised and agreed to have such ceremonial or other marriage performed. The plaintiff further says that after said marriage between her and the defendant had been annulled, that she and the defendant continued to live together, and lived together for a period of three years, down to or about June 1st, 1891, at different times and places as above set forth, and that during the period of three years referred to in the eleventh and twelfth paragraphs of the complaint, and at other times, the defendant promised and reiter-
28 ated his promises to have a ceremonial marriage performed between herself and the defendant.

Third. That on or about December 18th, 1887, the defendant commenced an action in the Supreme Court of the State of New York, held in the County of Kings, the purpose and object of which were to have said marriage contract between her and the defendant, in the fifth paragraph of the amended complaint referred to, annulled, and that such proceedings were thereafter had therein, as resulted in this Court's rendering its judgment and decree, declaring the marriage contract between the plaintiff and defendant, void and annulling the said marriage, and that said judgment and decree was entered in the Clerk's Office of the County of Kings, on or about April 9th, 1888. To this the plaintiff alleges that she had a good and substantial defense on the merits to said cause of action, and to each and every part thereof, and that she was prevented from availing herself of said defense by reason of the false and fraudulent representations of the defendant, as hereinbefore set forth. And the plaintiff further says that there was never any lawful marriage between herself and William G. Morrison, and she states that the defendant had full information in regard to whatever relations ever existed between the plaintiff and said Morrison, and that this defendant was fully satisfied that no marriage relation ever, at any time, existed between the plaintiff and the said Morrison; that this defendant was fully

informed and fully believed that the alleged and so-called marriage of the plaintiff and the said Morrison was illegal and invalid, and this plaintiff has always contended that her marriage with said Morrison was illegal and invalid.

Fourth. That each and every allegation in the third paragraph of the amended complaint contained, and each and every allegation in said complaint which charges the defendant with fraud,
29 deceit and misrepresentation in the procurement of said decree or judgment of this Court, declaring the marriage between her and the defendant void, and annulling the same, is true. She further alleges that said representations and statements made by the defendant for the purpose of procuring said judgment, or in the course of said action, or prior to the commencement thereof, was done for the sole purpose of misleading, defrauding and imposing upon the plaintiff, and for the purpose of taking undue advantage of her, and inducing her to forbear from defending said action, and of leading her to fail to assert and relinquish any rights of defense she might or could have exercised, and she states that all the allegations of fraud, imposition and deceit as set forth in her complaint are true.

Fifth. Denies each and every allegation set forth in the fifth paragraph of the defendant's answer to the plaintiff's amended complaint, except that she admits that it is true that a judgment was entered in the Supreme Court, County of Kings, State of New York, annulling said marriage, but that said judgment was obtained by reason of the false and fraudulent statements of the defendant, as hereinbefore more fully and particularly set forth.

Sixth. That as to the paragraphs of the defendant's answer herein numbered one to five inclusive, the plaintiff denies each and every allegation therein contained.

Seventh. Denies that she was conversant with all the proceedings in the action commenced by this defendant against her December 17th, 1887, when and as from time to time they were taken, denies that she knew just what the purpose and object of the action was, denies that the defendant is guiltless of the supposed fraud, imposition or deceit charged against him, and denies that she has submitted to the said judgment or acquiesced therein or she is
30 barred by her own negligence, laches and acquiescence from maintaining this action.

Eighth. As to the eighth paragraph of the defendant's answer to the plaintiff's amended complaint, alleges that on or about February 21, 1895, she commenced an action against this defendant in the Probate Court of Suffolk County and State of Massachusetts, and that at that time she was a resident of Boston. That said petition was a petition for separate maintenance, and that the issues involved in this action were in no wise considered in said action. That counsel for petitioner respondent in action before Probate Court, went before the Judge of said Court, and said petition was dismissed upon the understanding and for the reason that proceedings were pending, or were about to be brought before the Supreme Court of the State of New York, to determine the status of plaintiff and

defendant, and that said petition was dismissed upon the understanding that in case the relationship of husband and wife should be established between the plaintiff and the defendant by said Supreme Court, and upon the proceedings pending therein, the petition for separate support was to be renewed, and said judgment of said Probate Court, the County of Suffolk, Commonwealth of Massachusetts, entered on or about the twenty-fifth day of March, 1897, did not determine the questions at issue in the present proceedings, and was entered with leave to renew the said proceedings, as hereinbefore set forth.

Ninth. That she has no full, complete and adequate remedy at law.

Tenth. And the plaintiff alleges that she ought to maintain this action.

Eleventh. Plaintiff denies each and every allegation in said answer contained not hereinbefore specifically admitted or denied.

31 Wherefore, she demands the relief prayed for in her complaint herein.

W. H. VAN STEENBERGH,
Attorney for Plaintiff, 10 *Wall Street*,
Borough of Manhattan, New York.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Georgia L. Everett, being duly sworn, says that she is the plaintiff in the above-entitled action. That she has read the foregoing reply and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated to be alleged, upon information and belief, and as to those matters she believes it to be true.

GEORGIA L. EVERETT.

Sworn to before me this 3d day of November, 1900.

[L. S.] GEO. A. PERKINS,
Notary Public, Suffolk Co.

(Certificate to notary attached.)

32 Supreme Court, Kings County.

GEORGIA L. EVERETT, Plaintiff,
against
EDWARD EVERETT, Defendant.

This cause coming regularly on to be heard before me without a jury, at a Special Term of the Supreme Court for the trial of issues, held at the Kings County Court House on the 21st, 22d and 23d days of January, 1903, the plaintiff appearing thereat by W. H. Van Steenbergh, her attorney, and by Alfred E. Sander, of counsel, and the defendant appearing thereat by Zabriskie, Burrill & Murray, his

attorneys, and by George Zabriskie, Esq., of counsel, and proofs having been adduced by both parties tending to sustain the allegations and denials set forth, respectively, in the complaint, answer, and reply in this action, and due deliberation having been had thereon, I make the following

Findings of Fact.

I. That the plaintiff, at the time of the commencement of this action, was a resident of the City of Brooklyn, County of Kings, and State of New York.

II. That on the 30th day of October, 1884, the plaintiff was duly married to the defendant herein, at the City of Brooklyn, County of Kings, State of New York, by John Courtney, Justice of the Peace of the said City of Brooklyn and County of Kings.

33 III. That thereafter, up to the 1st day of June, 1891, the plaintiff and the defendant lived and cohabited together as husband and wife.

IV. That the plaintiff was never married to any person other than the defendant herein, as heretofore found.

V. That on or about December 17, 1887, the defendant commenced an action in this Court, in the County of Kings, against the plaintiff herein; that the said action was entitled "Edward Everett, against Georgie L. Morrison, sometimes called Georgie L. Everett, defendant;" that the said action was brought to annul the marriage between the parties, the plaintiff and defendant herein; that thereupon such proceedings were had that a judgment of this Court was rendered on April 9, 1888, and filed in the office of the Clerk of Kings County, whereby it was adjudged that no valid contract of marriage had been entered into between the plaintiff and the defendant herein, and that the marriage contract entered into between them on October 30, 1884, was void and that the said marriage be, and the same by said judgment was, annulled.

VI. That the defendant herein, intending to mislead this plaintiff, made to this plaintiff false and fraudulent representations (knowing them to be false) concerning the nature, the effect and object of the said action, for the purpose of inducing this plaintiff to abstain from defending the said action, and that the plaintiff, believing the said false and fraudulent representations to be true, did abstain from defending the said action.

VII. That this plaintiff at all times had, and now has, a good and substantial defense on the merits to the cause of action set forth in the complaint of the said action.

34 VIII. That the matters set forth under the 2d, 3d, and 5th defense, or either of them, in the answer herein, are not *res adjudicata* as to the issues herein.

IX. That the plaintiff herein was not guilty of laches in the commencement or prosecution of this action and has never acquiesced in the judgment which purports to annul her marriage to the defendant herein.

X. That the plaintiff has no full, adequate and complete remedy at law for the wrong and injury alleged in the complaint herein.

And I further make the following

Conclusions of Law.

I. That the plaintiff is entitled to judgment, in all respects vacating and setting aside the judgment or decree of this Court annulling the marriage between the parties herein, which said decree bears date the 9th day of April, 1888.

II. That the plaintiff is entitled to the further judgment and decree that the marriage contract heretofore made between the plaintiff and the defendant is still binding, and that the marriage between this plaintiff and the defendant is still in full force and effect.

III. That the plaintiff is entitled to the further judgment and decree that she recover of the defendant herein the costs and disbursements of this action, to be taxed by the clerk.

February 27, 1903.

WILLIAM D. DICKEY, *J. S. C.*

35 Supreme Court, Kings County.

GEORGIA L. EVERETT
against
EDWARD EVERETT.

GENTLEMEN: You will please take notice that the defendant herein, Edward Everett, excepts to the decision of the Honorable William D. Dickey, a Justice of this Court, made herein at Special Term, dated February 27, 1903, and filed in the office of the Clerk of the County of Kings March 6, 1903, in the following particulars:

First. To the first finding of fact and to each and every part of the same.

Second. To the second finding of fact and to each and every part of the same.

Third. To the third finding of fact and to each and every part of the same.

Fourth. To the fourth finding of fact and to each and every part of the same.

Fifth. To the sixth finding of fact and to each and every part of the same.

Sixth. To the seventh finding of fact and to each and every part of the same.

36 Seventh. To the eighth finding of fact and to each and every part of the same.

Eighth. To the ninth finding of fact, and to each and every part of the same.

Ninth. To the tenth finding of fact, and to each and every part of the same.

Tenth. To the first conclusion of law, and to each and every part of the same.

Eleventh. To the second conclusion of law, and to each and every part of the same.

Twelfth. To the third conclusion of law, and to each and every part of the same.

Thirteenth. To each and every part of the conclusion of law embraced in the first finding of fact, so called, though not separately stated as a conclusion of law.

Fourteenth. To each and every part of the conclusion of law embraced in the second finding of fact, so called, though not separately stated as a conclusion of law.

Fifteenth. To each and every part of the conclusion of law embraced in the third finding of fact, so called, though not separately stated as a conclusion of law.

Sixteenth. To each and every part of the conclusion of law embraced in the fourth finding of fact, so called, though not separately stated as a conclusion of law.

Seventeenth. To each and every part of the conclusion of law embraced in the seventh finding of fact, so called, though not separately stated as a conclusion of law.

37 Eighteenth. To each and every part of the conclusion of law embraced in the eighth finding of fact, so called, though not separately stated as a conclusion of law.

Nineteenth. To each and every part of the conclusion of law embraced in the ninth finding of fact, so called, though not separately stated as a conclusion of law.

Twentieth. To each and every part of the conclusion of law embraced in the tenth finding of fact, so called, though not separately stated as a conclusion of law.

Dated March 7, 1903.

ZABRISKIE, BURRILL & MURRAY,
Attorneys for Defendant, 49 Wall Street, New York City.

To the Clerk of the County of Kings and to William H. Van Steenbergh, Esq., Attorney for the Plaintiff.

38 At a Special Term of the Supreme Court for the Trial of Issues, held at the Kings County Court House, on the 27th day of February, 1903.

Present: Hon. William D. Dickey, Justice.

GEORGIA L. EVERETT, Plaintiff,
against
EDWARD EVERETT, Defendant.

The issues in this action having been regularly brought to trial before Hon. Wm. D. Dickey, one of the Justices of this Court, at a Special Term of the Supreme Court for the Trial of Issues, on the 21st, 22d and 23d days of January, 1903, the plaintiff appearing thereat by W. H. Van Steenbergh, her attorney, and by Alfred E. Sander of counsel; and the defendant appearing thereat by Zabriskie, Burrill & Murray, his attorneys, and by George Zabriskie, Esq., of counsel, and the Court having heard the allegations and proofs of

the parties, and the argument of counsel, and after due deliberation having duly made and filed a decision in favor of the plaintiff and against the defendant containing a statement of the facts found and conclusions of law directing a judgment in favor of the plaintiff,

Now, on motion of Alfred E. Sander, of counsel for the plaintiff, it is

Ordered, adjudged and decreed, that the judgment or decree of this Court annulling the marriage between the plaintiff and the defendant herein, which said judgment bears date the 9th day of April, 1888, be and the same is hereby in all respects vacated, annulled and set aside, and it is

Further ordered, adjudged and decreed, that the marriage
39 contract heretofore made between the plaintiff and the defendant is still binding, and that the marriage between this plaintiff and the defendant is still in full force and effect; and it is

Further ordered, adjudged and decreed, that the plaintiff recover of the defendant the sum of Five Hundred and Fifty-eight 20/100 ($558.20/100) dollars for the costs and disbursements in this action, as taxed by the Clerk, and that she have execution therefor; and it is

Further ordered, adjudged and decreed, that the plaintiff have leave to apply at the foot of this judgment for such other and further relief, to carry into effect the provisions of this judgment, as she may be advised and as may be just and equitable.

Enter.

WILLIAM D. DICKEY, *J. S. C.*

Granted February 27, 1903.

CHAS. T. HARTZHEIM, *Clerk.*

Supreme Court, Kings County.

GOERGIA L. EVERETT
against
EDWARD EVERETT.

GENTLEMEN: You will please take notice that the defendant herein, Edward Everett, appeals to the Appellate Division
40–215 of the Supreme Court for the Second Department, from the judgment in this action, entered in the office of the Clerk of the County of Kings, March 6, 1903, and from every part thereof.

Dated March 3, 1903.

Yours, &c.,

ZABRISKIE, BURRILL & MURRAY,
Attorneys for Defendant, 49 Wall Street, New York City.

To the Clerk of the County of Kings. William H. Van Steenbergh, Esq., Attorney for Plaintiff.

Supreme Court, New York County.

GEORGIA L. EVERETT
against
EDWARD EVERETT.

COUNTY OF NEW YORK, *ss:*

Learned Hand, being duly sworn, says he is managing clerk for Zabriskie, Burrill & Murray, attorneys for the defendant herein, and that no opinion was written upon the decision by Mr. Justice Dickey from the judgment upon which this appeal is taken.

LEARNED HAND.

Subscribed and sworn to before me this — day of July, 1903.

CHARLES H. HANSON,
Notary Public (No. 27), New York County, N. Y.

* * * * * * *

216 *Deposition of John O. Shaw, Jr., Read by Defendant.*

John O. Shaw, Jr., of Boston, in the County of Suffolk in the Commonwealth of Massachusetts, aged forty years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and summoned on the part of the defendant, doth depose and say as follows:

217 By Mr. ZABRISKIE:

My name is John O. Shaw, Jr. I live in Boston, on Marlboro street, No. 246. I am a lawyer. I have been a member of the bar since 1876. During that time I have been in practice in Boston all the time.

My office is 31 State street, Boston. I am acquainted with Edward Everett, the defendant in this action, very well. I have known him twenty-five years; I am well acquainted with his family. I know his mother; I never knew his father; I did not know his grandparents. I have lived in the same house with Mr. Everett, No. 16 West Cedar street. It was altered over into three bachelor apartments, and I lived in the lower apartment in Mr. Everett's house for from three to four years, from 1888 to 1891 or 1892, along there; 1891, the early part of 1891, if I remember rightly. Mr. Everett occupied the apartment immediately above me, or the middle apartment. The caretaker was a Mrs. Emery, who is now Mrs. Clara E. Maynard; I think she was there as housekeeper. During the time that I lived in that house the plaintiff in this action never lived there with Everett, to my knoweldge. I have only seen the plaintiff in this action once before, and I should not have recognized her now. I never saw her in that house at any time.

I remember a suit in the Probate Court of Suffolk County in which the plaintiff in this action was plaintiff and Edward Everett was defendant. In that suit process was served upon the defendant. The

defendant was at that time a resident of Boston. He has never resided anywhere else, to my knowledge, except temporarily. No, he has never resided anywhere else. He has been absent in Europe; he never had any legal residence anywhere else. Well, I do not know as that is a correct answer. I really don't know whether Mr. Everett's residence is in Manchester here on the shore or in Boston—I mean his legal residence, where he votes. His actual residence is in Boston. He has always lived here, except his temporary residence in Manchester and visits abroad.

218 In that suit in the Probate Court I appeared for him as his attorney. That suit was a petition for separate maintenance.

Mr. VAN STEENBERGH: I will admit that part of it.

In that proceeding I made a motion that the plaintiff be required to file specifications setting forth the particulars of the marriage which she alleged in her petition had occurred between herself and the defendant. That motion was granted. The specifications were filed in the Court. I saw them there. I remember seeing the specifications and having copies made. My office boy Walter T. Hannigan made a copy. I directed him to go to the Probate Court and make a copy of the specifications filed. I should say answers to my requests for specifications. He brought back a copy. I read that copy. I read it and it corresponded with what I remembered from reading the original as it was on file exactly. The paper which is now shown me is the paper which my clerk Hannigan brought back to me from the Probate Court as a copy of those specifications. I presume that paper was handed to me by my office boy. I kept it in my office until I sent it to you.

I have before me a certified copy of the record of that suit in the Probate Court, and among other things contained in it, there is a paper which appears to be a petition or a notice of motion for additional specifications. It is dated December 18th, 1896, and begins in this way: "And now comes the respondent in this action and admits that he and the petitioner had a marriage ceremony performed on or about October 30, 1884, in Brooklyn by John Courtney, Esq., Justice of the Peace." This paper was filed in the Probate Court, which of itself was a request to have these specifications filed by the plaintiff in that suit, showing if she had been relieved from those marriage obligations. It was a request for additional specifica-

219 tions. I don't remember whether that request was complied with, but that the docket of the Court will show. The docket entries which are contained in the certified copy of the record which I hold in my hand contain no reference to the filing of additional specifications, I should judge. I have no recollection of any additional specifications being filed. Taking that paper as a request for additional specifications, and in view of its not being complied with by the plaintiff, if I had wished to file additional specifications, it would be necessary, under the practice of that Court to take the motion into Court and ask for an order, as I understand it. I did not do that.

I recollect the final hearing of this cause before the Judge. Judge

Grant heard it. Freeman Hunt appeared on that occasion as counsel for the plaintiff, Mr. Charles C. Reed and myself appeared as counsel for the defendant. It has already been testified by Mr. Hunt that no written answer was filed in that case, and that, under the practice of the Court, no written answer was requisite; that is my understanding. I cannot say whether, according to the practice of the Court in such cases, the oral answer of the defendant is interposed at the time of final hearing or at some other time. The practice of the Probate Court is not carried on by regular pleadings as it is in our Superior or Supreme Court, but after these papers were filed, as they were, the case is marked by the Judge for a hearing, and at that hearing evidence is produced and the decree rendered. The defense which the defendant wishes to interpose, according to the practice of that Court, is brought to the attention of the Court at the time of the hearing. At the time it is produced it is set down for a hearing, marked for a hearing.

In this case we allege the defense; we set up a decree from the State of New York as a defense to this petition for separate maintenance here, a certified copy from the Court of the State of New York. That decree was offered in evidence. When we went into the trial, the marriage before Courtney was admitted by the
220 defendant. Having admitted that the marriage had taken place, it was alleged by the defendant that that marriage had been annulled by a decree, an exemplified copy of which I produced in Court. It was further alleged that the specifications that were filed by the plaintiff alleged practically that there had been a marriage by John Courtney, which was a ceremonial marriage, and that there was a subsequent common-law marriage. That decree, that paper that I had, was an exemplified copy of the decree which annulled the Courtney marriage and declared the reason therefor, and that she was a married woman and the wife of one Morrison. The fact that she was a married woman and the wife of William G. Morrison was alleged as one of the defenses of the defendant in this proceeding in the Probate Court. The matters of defense which were set up in this oral fashion which I have described, were in the first place that the Courtney marriage was annulled by the judgment of the Supreme Court of the State of New York, and in the second place that at the times I have referred to, mentioned in the specifications, she was the wife of William G. Morrison. I have stated that I offered in evidence a copy of the record of the Supreme Court of New York. That record was offered in support of both those two points. The title in the suit in the Supreme Court of New York, the copy of the record of which I offered in evidence in the suit in the Probate Court was "Edward Everett, plaintiff, against Georgia Lillian Morrison, sometimes called Georgia Lilliam Everett." The date of the summons in that case was December 9, 1887. The name of the plaintiff's attorney was Middleton S. Burrell, Esq. To the best of my knowledge, it is the suit in which judgment was rendered under date of April 4, 1888, confirming the report of Almet F. Jenks, Referee, dated March 6th, 1888. That is the same judgment which I offered before the Probate Court. I have not got the ex-

emplified copy of the record of that judgment which I offered in evidence.

It is understood to be admitted that the copy offered in evi-
221 dence, as testified to by the witness, is an exemplified copy of the judgment roll in the Supreme Court of New York, Kings County.

I have looked at the copy of the decree in this proceeding of the Probate Court, which is contained in the copy of the record before the Commissioner. According to the practice of the Probate Court, I should say it imports a final determination upon the merits of the issues involved in the suit.

Cross-examination by Mr. VAN STEENBERGH:

I know Edward Everett. I should say I have known him for twenty-five years or more. He is an attorney at law. I do not know how long he has been admitted to practice as such. I have merely general recollection on the subject. I should say he was admitted eight or ten years ago, perhaps longer; I don't know when he was admitted.

I have represented him professionally once or twice. I have represented him professionally in this litigation. I never represented him except in this Probate proceeding here for separate maintenance. I acted as his counsel in the City of Boston; acted as his adviser here, but not his representative. I have done so up to the present time. I am not attorney in any way, shape or manner now in any law suit for him. I do not represent him professionally. I am not his lawyer. He advises with me. So far as that proceeding is concerned, I have not represented him with Mr. Hunt, as to the details. I have not seen Mr. Hunt since this proceeding came up. I did not arrange with Mr. Hunt as to the employment of a stenographer. I conferred with Mr. Hill about the employment of a stenographer. I have had no consultations with Mr. Everett since the taking of these depositions has been going on. Save in a friendly way, nothing to advise about it. Mr. Zabriskie was here, and took sole charge.

Prior to the arrival of Mr. Zabriskie I will say I made ar-
222 rangements for the coming of certain witnesses here for the assistance of Mr. Zabriskie. When the commission was issued out of and under the seal of this Court in this particular action I did not then appear or pretend to represent Mr. Everett in that matter. Prior to the appointment of Mr. Hill an attempt was made to agree upon a Commissioner. I have counselled and advised with him continuously up to this time. I have always been a friend of his, and I am an attorney for him, but I am acting in no professional capacity. He has no litigation pending in which I appear as attorney of record at the present moment.

I am familiar with the various steps that have been taken in these various litigations. I know a little about them, not a great deal. I have read the evidence, etc. I have been advised in detail as to the very steps that have been taken, and as to the present status of the various litigations.

I made an affidavit in the action about which I have been interro-

gated by Mr. Zabriskie, wherein Mr. Everett was the plaintiff, and this plaintiff the defendant. I think some other affidavits were taken before me. I did not procure them. I did not draw any of those affidavits. I am positive as to that. Some of them were sworn to before me, but I don't remember drawing any. To my recollection I drew none of the affidavits used in the action entitled Edward Everett, plaintiff, and Georgia Lillian Everett, defendant.

I stated that I appeared for Mr. Everett in the Probate Court in the action brought, or proceeding brought, by the plaintiff for her separate maintenance. That court is a court of record. That court has a docket; I understand that entries are usually made in that docket of all the proceedings had in an action; they are made by the clerk. It is possible to ascertain in detail just what steps were taken in that matter.

I kept no law register myself. I have given somewhat in detail the proceedings that were had, what papers or pleadings were filed in that proceeding. I have recently taken no steps to refresh my recollection with reference to that proceeding. My memory
223 is good. This is entirely a matter of recollection on my part. I have thought of it; but I have not refreshed my recollection. I have not been in the Probate Court for two months or more. That court has exclusive jurisdiction of proceedings of this kind. They can only be brought in that Court, to the best of my knowledge. Papers and pleadings which are filed and used in proceedings of this character are not served upon the attorneys who appear for the respective parties. They are served on the parties themselves.

By Mr. ZABRISKIE:

I refer to the original process.

By Mr. VAN STEENBERGH:

Not only the original process, but any pleadings or papers used in the proceedings are filed in the office of the Registrar, and not served on the attorneys who appear. I filed no written pleading or answer in that proceeding; no written answer was required. I suppose there could have been a written answer filed. As a matter of fact, none was filed.

Testimony was taken in that case before the Probate Judge. No written testimony. There was the oral statement of the facts of the case before the Judge. Oral testimony, or, call it what you please. I testified; I was not sworn. I was counsel stating the facts. Nobody was sworn, as I recall it. It was an informal hearing on that petition—it was a hearing on that petition which took an informal character. I produced and offered in evidence an exemplified copy of the judgment roll, which had been obtained from the Clerk's office of the County of Kings, New York. I don't know what has become of that paper. My recollection would be that I either gave it back to Mr. Everett or sent it back to Mr. Zabriskie within a reasonable time after that case was disposed of, as I had no further use for it.

224 I understand the effect of non-suit. I don't think this decree to which my attention has been called by counsel for the defendant had the same effect as a non-suit. I don't think it is as usual to incorporate the words "upon the merits" in an action of this character as it is the words "after a hearing."

No testimony was given before the Court in support of the allegations of the petition, because we did not consider it necessary; I did not consider it necessary for my part of the case.

The Court did not state that in case proceedings were taken by the plaintiff or petitioned to set aside the so-called Brooklyn decree annulling the marriage, that the Court would again take up this proceeding *de novo*. There was considerable talk, but I cannot answer that categorically yes or no*w*. I will state the facts. Mr. Hunt requested that the petition be dismissed without prejudice, and, after a discussion whether it should or should not be so dismissed, it was decided that it should not be so dismissed. That is to say, the words "without prejudice" should not be added. I don't know whether it was with Mr. Hunt's consent or not, but it was by the Judge's orders. I will put it in that way. It was then stated by the Judge if proceedings were commenced in New York to reverse this decree—when I say decree I mean the annulment decree—and those proceedings were successful and it was decided by the State of New York that the decree should be reversed, that this plaintiff Miss Hinman, whoever it is, should not be prevented from again coming to this Court on a similar petition. I think that is the whole statement of fact. I think I am quite clear as to what occurred in that proceeding. It was three or four years ago; three or four years ago, something like that. No further or other proceedings were had other than I have stated. That was the end of that case, if I remember.

I have given some testimony as to where I lived in the years 1888, 1889, 1890 and 1891. I stated that at that time I lived in the defendant's house, or the apartments owned by the defendant
225 in West Cedar street. That was a house that had been altered over into bachelor apartments. They were known as bachelor apartments. The three floors had been made into a parlor, bedroom and bathroom on each floor. There was a kitchen below, and above the third floor, which contained the three bachelor apartments, were rooms which were occupied by the housekeeper. There was no room for housekeeping in the men's apartments. The occupants of those apartments could have something to eat there if they required, because there was a kitchen below, but they never did; I never did.

Those apartments, at the time testified to by me, were occupied by no person other than bachelors to my knowledge. There was myself on the lower floor, Mr. Everett was on the next, and a Mr. Thompson on the next or third. After I left there was a man named Rich who took my apartm*a*nt. I am a married man now. I was not married then. I was not married until after I left those apartments. I was in my apartments during the day. Practically every afternoon from, say, after four o'clock or so. Mr. Everett and I were compelled to go into the same entrance in order to reach *a*re respect-

ive apartments. During the period that I lived in these apartments I never saw this plaintiff there. She may have been there and I never saw her. It is possible.

It is my recollection that the paper marked for identification, Exhibit 1, is a complete copy of the specifications filed by the petitioner in the Probate Court in the proceedings to which you have testified. It contained no other matter than that shown by the paper that I can remember. It covered what I wanted to get, what I was after.

The exemplified copy of the judgment roll which I offered in evidence was offered for the purpose of showing that the Courtney marriage, so-called, was annulled, and for the further purpose of showing that a common law marriage could not have been contracted. I so stated. One of the defenses set up and interposed by me in that proceeding was the existence of the so-called Morrison marriage. She was a married woman. There was proof in
226 the judgment roll which I offered in evidence, competent proof, of the existence of the Morrison marriage. The decree stated, as I remembered it, the reasons why the Courtney marriage was annulled, that she was a married woman, and at that date was a married woman. Being a part of the decree, I supposed it was competent.

Mr. Everett's rooms in West Cedar street were up one flight of stairs, and there was a bath room in the centre between a parlor or sitting room, or whatever you may call it, which faced on West Cedar street, and on the other side of the bath room was two bed rooms. They were the same size as the bed room in my apartment, only they were divided into two. What I mean by that is that my room below had one bed room and his had two with a partition in between making two smaller rooms instead of one large one. The furniture which was contained in Mr. Everett's apartments was nothing remarkable, rather plain; nothing any better than I had in my apartment. No different than any other bachelor had in his apartments, so far as I could see.

Redirect examination by Mr. ZABRISKIE:

An appeal would have lain from this decree of the Probate Court to some higher Court. To the Supreme Court, and I believe the Superior Court now, by statute. No appeal was taken from this decree.

I was asked if the hearing in this Court was in some respects an informal hearing. I meant it was informal from the fact that there were no witnesses; there was no evidence taken. We appeared before Judge Grant in his lobby. By his lobby I mean not in the court room, but in the room adjoining the court room where his desk is, where he stays. And we appeared there, this case having been set down for a hearing on that morning before him, and as I say, there not being any witnesses, or facts, relying entirely on the judgment roll, is why I spoke of the matter as an informal procedure. This was heard, I mean, in the Judge's private chamber instead
227 of in the court room. That was by assent of all parties; it is very frequently done. There was no informality in the

procedure other than I have described. That kind of procedure is common in the Probate Court—very common.

When I say there was no evidence I mean witnesses. No witnesses were examined. The evidence submitted was this judgment roll; that is all. That hearing was a formal hearing before the Court in a judicial sense entirely.

Recross-examination by Mr. VAN STEENBERGH:

The decree concerning which I have just testified was appealable, at the time it was made, from the Probate Court to the Supreme Court. My recollection is that now, or within a few years, the statute has allowed appeals to be taken from the Probate to the Superior Court. I am not sure of the date of that statute that gave the Superior Court appellate jurisdiction. Thirty days is the time of the appeal in the Probate Court. What I meant by that was that there is a statute covering another court of appellate jurisdiction passed within a few years. It was not necessary for the decree in that case, or a copy of it, to be served upon any of the parties in order to cut off their time of appeal. Mere entry on the docket was sufficient to set the time running as to the limitation, the time in which to appeal.

I doubt if I ever saw the plaintiff before. There was an occasion several years ago—oh, I should say it was fifteen years ago—a good while ago—that Everett—Mr. Everett told me he had some business with her and wanted to use my office one Sunday morning, and he brought her to my office, and I stayed in my other private room, and they were there about half an hour and then went away. Whether I saw her, or whether I did not, I do not know. I don't know the nature of the business transacted in that office that Sunday morning.

228 By Mr. HUNT:

I understood the ground of the Judge's dismissal of this petition was the existence of this decree of annulment in New York. I understood that the grounds of the dismissal of this petition before the Probate Court was because of the existence of this decree of annulment of the Everett marriage. Because of all the facts contained in that judgment roll presented to the Court he grounded his decree on the provision—the exemplified copy of this judgment roll from the State of New York. That judgment roll contained more than the decree of annulment; it contained the record of service; it contained the facts of personal service; it contained the report of the Referee; it contained the decree of the Judge; it contained more than a simple decree; it contained a great deal more than a decree alone. The final adjudication was the annulment of the marriage in that exemplified copy; it contained a decree annulling the marriage; it was a part of that judgment roll. We relied on the whole of that.

Deposition of Charles C. Read, Read by Defendant.

CHARLES C. READ, of Cambridge, in the County of Middlesex, in the Commonwealth of Massachusetts, aged forty years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and summoned on the part of the defendant, doth depose and say as follows:

By Mr. ZABRISKIE:

My name is Charles C. Read. I live in Cambridge. I am a member of the Massachusetts bar. I think I was admitted to the bar in 1867. I practice my profession in Boston.

I remember a cause in the Probate Court for the County
229 of Suffolk in which Georgia L. Everett was plaintiff and Edward Everett was defendant, in which the plaintiff was suing for separate maintenance. I was one of the counsel for the defendant, associated with Mr. Shaw—Mr. John O. Shaw, Jr. I appeared as counsel for the defendant and took part in the hearing of the cause before Judge Grant. We made no written answer; it was oral. The defense was that the marriage as claimed had been annulled by the decree of the New York Court. I mean the marriage which the plaintiff claimed to have contracted with the defendant before a justice of the peace. I won't be positive about the name of the justice of the peace, but I think it was John Courtney or some name like that. It may have been John L. Courtney. The other matter of defense which was set up was that the decree of the Court showed that she had been previously married to a Mr. William G. Morrison. When she had a husband she could not contract a common-law marriage. The name was Morrison I won't be sure about William—it was Morrison. The defense was that she was married previously to William G. Morrison—previous to either of these alleged marriages to Mr. Everett, and that the common-law marriage which was claimed was subsequent to the marriage before the Justice of the Peace Mr. Courtney, and that she could not contract a common-law marriage while she had a husband living named Morrison. Those were substantive matters of defense which were set up by Mr. Everett in that suit.

In support of that defense we offered in evidence a very long, extended decree from the Supreme Court of New York. I think it was the Supreme Court, but what the name of the Court was I don't know, it was from the higher Court in New York—it was a very long paper. It was a decree of the Supreme Court of New York, made in Kings County April 4, 1888, in a suit entitled "Edward Everett *v.* Georgia L. Morrison, sometimes called Georgia L. Everett." When I speak of the decree, I mean that what was offered in evidence was the record, the judgment roll in that case, the cause
230 in which the judgment was made April 4, 1888.

At that hearing Mr. Freeman Hunt represented the plaintiff. There was no very elaborate argument. There was argument by both sides.

The language of the decree which forms part of the exemplified copy of the record in the suit in the Probate Court which is marked "No. 2" for identification, according to the course and practice of the Court and the customary form of decrees, imports a final decree determining the issues in that cause.

Cross-examination by Mr. VAN STEENBERGH:

My attention was last called to this matter about two or three minutes ago, just as I came here.

Mr. Zabriskie just spoke to me in the other room about it.

I think I was attorney of record for the defendant in this proceeding which was instituted in the Probate Court; it is a great while ago; I appeared with Mr. Shaw as associate. If my name is not on the record it should have been put there. I don't know whether it is there or not. I cannot speak at this length of time with absolute certainty; I intended that it should have been there, and I presume that it was. It should have been there. I appeared as counsel regularly in it. We do not have any distinction between attorney and counsel in Boston; a man is an attorney or counsel just as he happens to be. I cannot say at this length of time whether I signed any of the pleadings in the case or other papers, or caused my name to be signed. I appeared just as is our practice in Boston. If we appear as counsel in a case, it means to *to* advise and try the case. I appeared regularly.

I was present at all the proceedings that took place before the Judge. I took part in them, too. Certain defenses were interposed upon that hearing. I don't think there was any written answer. As I understand the practice in that court that is not necessary. I don't think there was any testimony given by witnesses.

231 In our practice in our Probate Court there is not what you call in New York the regular calendar; there is a little paper on the clerk's desk, very often saying what cases are coming up, but it is not like the other courts where we have a regular calendar.

It was my understanding that this case was submitted by both sides to be disposed of by the Court. I understood that it was to be decided by the Court upon the merits. Under the decision of the Court that day this party could go in again, as I understand it, provided he in the meantime had that decree of the Supreme Court and that record annulled and reversed. While that record and decree stood as it was when we introduced it into the case—while that stood in that way, this was a final decree, but the Court stated in words substantially to the effect that he would not say that she could not come back again if that decree, the New York decree, which I have referred to, was reversed, or set aside. Otherwise not, as I understood the Court—final except for that reason. The Court did not hold that providing the status of the parties changed, it would be without prejudice. I said before that the decree was a final decree of the Probate Court here in Boston; that is the decree which I have referred to in New York which set out that this lady had a previous husband and had been married before, if that decree were set aside, annulled or reversed, whatever you may call it, in New York, then he would not say but that the petitioner might come again to this

Court, but except on that condition it was a final decree here. My memory is that the roll which I produced in the hearing before Judge Grant contained a decree which adjudged and decreed that the so-called Morrison marriage concerning which I have testified was in existence. I should like to see the decree. It is a very long document, and it is several years since I have seen it; that will state. Like any man's memory, mine is likely to be fallacious. On my direct examination I spoke in a general way about the decree, but as for saying exactly what the decree contained, I should rather look at the decree. The decree would be the best evidence I sup-
232 pose. I am sure of some points the decree contained to which I have testified; I am not sure what the whole decree was.

The decree contained an adjudication, or words to that effect, that there had been a previous marriage to Mr. Morrison. That I am positive of. Whether it is called an adjudication I won't be positive. The decree set out the fact that there had been a previous marriage to a Mr. Morrison. Whether it contained any language adjudging and decreeing that that so-called Morrison marriage was in existence at the time of the granting of the decree, that was the reason of the Court for annulling the marriage of Mr. Everett. That was my understanding of the matter at that time. I should say now, that the decree contained language adjudging and decreeing that the Morrison marriage was still in existence. I am positive of that. The decree contained words to this effect: That the marriage of Mr. Everett was declared annulled, because of this previous marriage to a Mr. Morrison; I am sure of that. I have not seen the decree since the time of the hearing in the Probate Court. I should say that was a year and a half ago, something like that. I don't remember just when it was. It was quite a while ago. I won't be positive when it was, but it was quite a long time ago. It was not five years ago. I have said a year or a year and a half something like that; it may be a little more and a little less. I had the copy of the decree in my office, as I should have any paper, before I went into Court on it. I have not examined it or seen it since that day.

Redirect examination by Mr. ZABRISKIE:

Judge Grant said upon that hearing that he would not say that if the New York decree should be reversed or annulled, the complainant could not come back with a new petition of the same sort. He stated it in that way. He did not give a decision whether he might or might not, but he did not say then he might not; he did not say he might, even then. The remark that he made upon
233 that occasion was understood to be an expression to guard against deciding the question. He did not say you may come back. He said he would not then pass on whether he might or might not in the future. The question was before him, but, except that, it was a final decree.

Recross-examination by Mr. VAN STEENBERG:

Judge Grant was not in the court room when he disposed of this matter. We frequently have hearings in the Judge's lobby.

No stenographic report was made of this matter to my knowledge. We do not have a stenographic reporter in the Probate Court.

Mr. Hunt, counsel for the plaintiff, did not raise the question as to whether an application based upon a petition of this same character by the same party might not be renewed. I am sure I did not understand it so. I am sure I did not hear him. I am quite positive on that. It was not the question at issue. Clearly it was not the only question that arose, but I don't remember that it was brought to the attention of the Court specifically by Mr. Hunt. Mr. Hunt, counsel for the plaintiff, asks the Court to dismiss the petition without prejudice to a renewal of the same, and the Court refused to do so.

Redirect examination by Mr. ZABRISKIE:

I used the expression "lobby." By the "lobby," we mean here in Massachusetts, a private room connected with court rooms where the Judges often have small hearings or consultations with each other or to meet lawyers on motions, formal and informal hearings. If there was to be a discussion before the Court in the Superior Court on some question, the Judge would just as like as not take us into the lobby and let us fight it out there.

234 *Deposition of Walter T. Hannigan, Read by Defendant.*

Walter T. Hannigan, of Dorchester, in the "Commonwealth" of Massachusetts, age 22 years and upwards, being summoned on the part of the defendant, doth depose and say as follows (it being agreed that the witness may be duly and publicly sworn pursuant to the directions hereto annexed, when he signs his deposition):

By Mr. ZABRISKIE:

My name is Walter T. Hannigan. I live at 29 Eastman street, Dorchester. I am 22 years old. I am a clerk for J. O. Shaw, Jr. I have been in his employ about nine years. I recollect being directed by Mr. Shaw to go to the office of the Probate Court and make a copy of specifications in the case of Everett *vs.* Everett. I went and got the specifications from the file of the Court and copied it. This paper, marked "Exhibit 1," for identification, is in my handwriting. It is the copy which I made from the specifications in the case of Everett *vs.* Everett, on file in the office of the Register of the Court. I think it is a copy of the whole of that paper, except for the heading and the title. To the best of my recollection, it is a copy of the whole paper, with the exception of the title. It is a correct copy; I copied it correctly when I copied it. I made the copy in the Probate Office. After I made the copy I put the original specifications in the file and left them in the tin to be returned. I gave the copy which I made to Mr. Shaw. This paper which I now hold in my hand is the copy which I made. I believe it to be a correct copy.

Cross-examination by Mr. VAN STEENBERGH:

I am positive that this is a copy of the specifications which I found in the Probate Clerk's office in its entirety, except the heading. I

don't remember the date when I made the copy in question;
235 I should say it was somewhere around about a year ago, about that, or two years ago; I don't remember the exact time. I did not compare this copy with the specifications as filed with anyone; I copied it right off. I don't think the original specifications may have contained something which does not appear in my copy. I have done a great deal of Court work. I made no comparison of it. I am quite sure that that paper which has been handed to me is the copy which I made at the time and place indicated by me. I gave it to Mr. Shaw. I have seen it between the time I gave it to Mr. Shaw and the present time. I think I took it to New York with me last year.

By Mr. ZABRISKIE:

I think it was June 1899; at the time that the hearing came up in Brooklyn.

By Mr. VAN STEENBERGH:

I think I took it over with me at that time. I am still in Mr. Shaw's office. I know Mr. Everett; I have seen him for four or five years, I guess. I have had no talk with him as to what I was to testify to at this hearing. I have had no talk with Mr. Shaw as to what I would testify. Mr. Shaw told me I would be expected to testify in this matter just that it was my writing.

Deposition of Elijah George, Read by Defendant.

Elijah George, of Boston, in the County of Suffolk, in the Commonwealth of Massachusetts, aged fifty years, being duly and publicly sworn pursuant to the directions hereto annexed, and summoned on the part of the defendant, doth depose and say as follows:

236 By Mr. ZABRISKIE:

My name is Elijah George. I am fifty years old. I am Register of Probate and Insolvency in Suffolk County, Massachusetts. I am an officer of the Probate Court for the County of Suffolk.

I have held that office for twenty-three years. The certified copy of the record in the Probate Court for Suffolk County of the proceeding in which Georgia L. Everett was plaintiff and Edward Everett defendant, or respondent, in which the complainant asked for separate maintenance, marked "Exhibit 2 for identification" is certified by me. This is my signature on the first and third certificates, and also the signature of Judge McKim on the second certificate. That record was made up under my supervision. It appears to be a complete record of all the papers on file in the proceeding and of the documents relating to the case.

In the docket entries as stated in that record there is a memorandum of specifications filed April 1, 1895. The specifications referred to are not now on the files of the Probate Court. I cannot find them. I looked for it this morning, and I cannot find it. I recollect having search made for that document some time ago

without being able to find it. There are two entries that indicate that that paper was once on file beyond any question; one is an entry on the docket to show what was filed, and then on the motion for the specifications is an endorsement of one of my assistants, "Specifications filed April 1, 1895." There are two bits of evidence on that.

It is very rarely that an answer is filed in a proceeding for separate maintenance in the Probate Court. The defendant's position, according to the practice of that Court is usually stated at the hearing.

According to the practice of the Probate Court the decree is drawn up not by counsel or Judge, but by the Register, under the direction of the Judge. In this case it was drawn up by my assistant. It is drawn up pursuant to a memorandum which he puts upon the back of the paper. I presume there is one here. Yes; my memorandum appears upon the back in pencil signed by the ini-
237 tials of the Judge. The memorandum on the back of the paper to which I have referred reads: "Decree March 25. Petition dismissed. R. G." The language of the decree part of the decree, according to the course and practice of that Court, imports a final decree, a final disposition of the issue. It is a decree upon the merits in the usual form. The Probate Court is the Court which at this time had sole jurisdiction to grant separate maintenance to a wife; that is, jurisdiction in such a case as this, except on appeal. Of course, it had the original jurisdiction.

Cross-examination by Mr. Van Steenbergh:

I could not recall whether I was present at the time this hearing came on or not. I recall this proceeding, not as to the actual hearing, but I recall the proceedings very well. I have no distinct recollection at this moment of being present at the actual hearing of the case; however, I may have been. I cannot say that I can recall now what was stated by counsel for the respective parties, or what was stated by the Court, at the time of making the endorsement, as testified to by me.

It is possible that the specifications that I have testified to may have been mislaid or got by mistake in some other papers. No one would have the right to take those specifications from the files, but it is quite possible they might have done so; because of the form in which papers are used in the Probate Court, it would be quite possible for a person to abstract a paper without our knowledge. We never let papers go outside of the office. If an attorney comes into the office, we permit him to take the package and use it so long as he sees fit, without immediate supervision.

I cannot say that I ever say these specifications concerning which I have testified. I don't remember that I ever saw them. With the multitude of papers I have to handle there, it is impossible for me to say.

238–248 Redirect examination by Mr. ZABRISKIE:

I remember inquiries made of me on several occasions in regard to these specifications. I instituted a search in the office for them. I made a thorough overhauling of everything we could think of to find this particular paper, and we were not able to do it.

An appeal could have lain from this decree, within thirty days from its date, to the Supreme Court. No appeal appears to have been claimed. Formerly the jurisdiction of these matters was in the Supreme Court; then it was transferred to the Probate Court, with appeal to the Supreme Court, and then appeal was transferred to the Superior Court. At the time of this decree, in 1887, the appeal lay to the Superior Court.

* * * * * * *

249 Defendant's counsel reads in evidence from the Constitution of the State of Massachusetts, Part 2, Chapter 1, Section 1, Article 3. Also, Part 2, Chapter 3, Article 4:

CONSTITUTION OF MASSACHUSETTS, DEFENDANT'S EXHIBIT K.

CONSTITUTION OF MASSACHUSETTS, PART 2, CHAPTER 1, SECTION 1, ART. 3.

The general Court shall forever have full power and authority to erect and constitute judicatories and Courts of record or other courts to be held in the name of the Commonwealth for the hearing, trying and determining of all manner of agreements, offices, pleas, processes, plaints, actions, matters, causes and things whatsoever arising or happening within the Commonwealth of between or concerning persons inhabiting or residing or brought within the same: whether the same be criminal or civil or whether the said crimes be capital or not capital and whether the said pleas be real personal or mixed; and for the awarding and making out of execution thereupon. To each Courts and judicatories are hereby given and granted full power and estate from time to time to administer oaths or confirmations for the better discovery of truth in any manner in controversy or depending before them.

Ibid., Chapter III, Article 4:

The Judges for probate of wills and for granting letters of administration, shall hold their Courts at such place or places on fixed days as the convenience of the people shall require; and the legislature shall, from time to time hereafter, appoint such times and places; until which appointment the said Courts shall be holden at the times and places which the respective Judges shall direct.

250 Defendant's counsel reads in evidence from the Public Statutes of Massachusetts (Chapter 156, Sections 1, 2 and 24). Also from the Public Statutes of Massachusetts of 1882 (Chapter 147, Sections 33 and 24, and from Chapter 146, Sections 37).

PUBLIC STATUTES OF MASSACHUSETTS. DEFENDANT'S EXHIBIT L.

PUBLIC STATUTES OF MASSACHUSETTS OF 1882 CHAPTER 156.

SECTION 1. The probate court of the several counties shall be courts of record and the Judge and Register of probate and insolvency for each county shall be the Judge and Register of the probate court of said county.

SECTION 2. The probate court for each county shall have jurisdiction of the probate of wills, of granting administration on the estates of persons who at the time of their decease were inhabitants of or resident in the County and of persons who die out of the Commonwealth leaving estate to be administered within the County; of the appointment of guardians to minors and others; of all matters relating to the estates of such deceased persons and wards; of petitions for the adoption of children and for the change of names; and for such other matters as have been or may be placed within their jurisdiction by law.

SECTION 24. They (Judges of the probate courts) may transact business out of Court at any time and place, when all parties entitled to notice therein assent thereto in writing or voluntarily appear; and in such cases their decrees shall be entered as of such sessions of the court as the convenience of the parties may require.

Ibid., Chap. 147, Section 33:

When a husband fails without just cause to furnish suitable support for his wife or has deserted her or when the wife for justifiable causes is actually living apart from her husband the probate court may by its order on the petition of the wife or if she is in-
251 sane on the petition of her guardian or next friend prohibit the husband from imposing any restraint on her personal liberty for such time as the court shall in its order direct or until the further order of the court thereof; and the court may upon the application of the husband or wife or of her guardian make such further order as it deems expedient concerning the support of the wife and the care, custody and maintenance of the minor children of the parties and may determine with which or either parents the children or any of them shall remain; and may from time to time afterwards on a similar application revise and alter such order or make a new order or decree as the circumstances of the parents or the benefit of the children may require.

SECTION 34. A petition under the preceding section may be brought in the county in which either of the parties lives except that if the petitioner has left the county in which the parties have lived together the adverse party still living therein the petition shall be brought in that county.

CHAPTER 146, SECTION 37. The court may enforce decrees made for allowance for alimony or for allowance pending libels or upon or after final decrees of divorce in the same manner as decrees are enforced in equity.

DEFENDANT'S COUNSEL: I offer in evidence the record of a suit in the Probate Court for Suffolk County, Massachusetts, brought by the plaintiff here against the defendant here, in which the petition bears date February 15, 1895.

Also, the specifications filed by the plaintiff in the suit in the Probate Court.

252 EXEMPLIFIED COPY OF PROCEEDINGS IN MASSACHUSETTS PROBATE COURT, DEFENDANT'S EXHIBIT M.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Registry of Probate.

I, Elijah George, Register of the Probate Court for said County of Suffolk, having by law the custody of the Seal and all the records, books, documents, and papers of or appertaining to said Court, hereby certify the papers hereunto annexed to be true copies of the original papers, compared therewith, appertaining to said Court, and on file and of record in the office of said Court, to wit:—the petition of Georgia L. Everett, of Boston, in said County, for separate support, the Order of Notice on said petition, and the decree of said Court dismissing said petition:—the Motion for Specifications and allowance of the same:—the Motion for Respondent to pay sum to Petitioner to prosecute suit, and the Motion by Respondent; also the Docket Entries of the case, being the entire record in said Court with the exception of the specifications which are missing from the file of said Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] ELIJAH GEORGE, *Register.*

253 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Probate Court.

I, John W. McKim, Esquire, Judge of the Probate Court within and for the County of Suffolk, hereby certify that Elijah George, Esquire, whose signature is affixed to the annexed certificates and attestation, is the Register and proper Certifying Officer of said Court, and has, by law, the custody of the seal, and all the Records, books, documents and papers of, or appertaining to said Court, and that said certificates and attestation are in due form and entitled to full faith and credit.

In witness whereof, I have hereunto set my hand, this fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN W. McKIM,
Judge of Probate Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Registry of Probate.

I, Elijah George, Esquire, Register of the Probate Court within and for the County of Suffolk, hereby certify that John W. McKim, Esquire, whose signature is affixed to the annexed certificate, is the senior presiding Judge of this Court, duly commissioned and qualified, and that his said certificate is in due form, and entitled to full faith and credit.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] ELIJAH GEORGE, *Register.*

254 To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents Georgia L. Everett, of Boston, in the County of Suffolk, that she is the lawful wife of Edward Everett, of said Boston, that her said husband fails, without just cause, to furnish suitable support for her, and has deserted her; and that she is living apart from her said husband for justifiable cause and she herein sets forth the following specifications:

Wherefore your petitioner prays that said Court will make such order as it deems expedient concerning her support.

Dated this sixteenth day of February, A. D. 1895.

GEORGIA L. EVERETT.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Probate Court.

On the petition of Georgia L. Everett, of Boston, in said County, the wife of Edward Everett, of said Boston, representing that her said husband fails without just cause to furnish suitable support for her, and praying that said Court will make such order as it deems expedient concerning her support.

It is ordered that the petitioner give notice to the said Edward Everett, to appear at a Probate Court to be held at Boston, in said County of Suffolk, on the twenty-first day of March, A. D. 1895, at ten o'clock in the forenoon, by delivering to him a copy of this order fourteen days at least before said Court, if he may be found within this Commonwealth, that he may then and there show cause, if any he has, why the prayer of said petition should not be granted; or, if he shall not be so found, by delivering to him such copy wherever found, or by leaving such copy at his usual place of
255 abode, or by mailing the same to him at his last known post-office address fourteen days at least before said Court; and also, unless it shall be made to appear to the Court by affidavit that he has had actual notice of the proceedings, by publishing the same

once in each week for three successive weeks in the Boston Post a newspaper published in Boston, the last publication to be one day at least before said Court.

Witness, John W. McKim, Esquire, Judge of said Court, this twenty-first day of February, in the year one thousand eight hundred and ninety-five.

ELIJAH GEORGE, *Register.*

SUFFOLK, *ss:*

BOSTON, *February 28th*, 1895.

By virtue of this precept I this day notified the within named Edward Everett to appear and show cause at Court as within directed by delivering to him in hand an attested copy of the within order of Court.

Fees service	.50
Copy	1.00
Travel	.08
	$1.58

JEREMIAH G. FENNESSEY,
Deputy Sheriff.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Probate Court, March 21st, 1895.

GEORGIE L. EVERETT
vs.
EDWARD EVERETT.

And now comes the defendant in the above entitled action, and appearing under protest, moves that the plaintiff be required to file forthwith, full specifications as to how, when and where she
256 became the lawful wife of the defendant.

By His Attorney, J. O. SHAW, JR.

March 21, 1895. Allowed—

ROBERT GRANT, *Judge.*

Specifications filed April 1, 1895.

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully moves the petitioner that the ¶Honorable Court order the respondent to pay the petitioner a sufficient sum to carry on the expense of a separate maintenance suit brought by the petitioner against the respondent.

GEORGIA L. EVERETT,
By Her Att'y, FREEMAN HUNT.

[Endorsed:] Georgia L. *vs.* Edw. Everett. Petition, Citation and Decree for Motion for Respondent to pay to Petnr. sum to maintain suit. Filed Mar. 21, 1895.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Probate Court, Dec. 18, 1896.

GEORGIE L. HINMAN, Sometimes Called GEORGIE L. EVERETT,
vs.
EDWARD EVERETT.

And now comes the Respondent in this action and admits that he and the Petitioner had a marriage ceremony performed on or about October 30th, 1884, in Brooklyn, by John Courtney, Esq., Justice of the Peace.

And the Respondent further avers that on April 4th, 1888, by decree of the Supreme Court of the State of New York, said supposed marriage was decreed null and void, on the grounds and for
257 the reason that the Petitioner was at the date of said supposed marriage a married woman and the legal wife of one William G. Morrison.

And the Respondent further avers that the Petitioner on or about July 21st, 1892 at a special term of the Supreme Court of the State of New York, held at Brooklyn, obtained an order that said decree be vacated and set aside and that she be granted leave to answer, and that thereafter to wit, on July 22d, 1892, the respondent appealed to the General Term of said Court, from said order, and that further to wit, on December 13th, 1892, the decree of said General Term of said Court was issued, decreeing that said order so appealed from, be and the same hereby was in all respects reversed with costs.

And the respondent further avers that by the said decrees of the Supreme Court of New York the petitioner was recognized as being and adjudged still to be a married woman and the legal wife of said William G. Morrison.

And it being important that the respondent should know, for the purpose of the trial of this petition, whether the petitioner was not at the time of the filing of her petition still the legal wife of said William G. Morrison, as the said Supreme Court had adjudged her to be.

The respondent now prays that this Honorable Court order the petitioner to file forthwith further specifications setting out whether or not at the date of the filing of her petition she had in any way, at any time been relieved from the obligations of her marriage to said William G. Morrison, and if she claims to have been so relieved to state fully when, where and in what manner.

By His Attorney, J. O. SHAW, JR.

(Filed Dec. 18, 1896.)

258 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

At a Probate Court holden at Boston, in and for said County of Suffolk, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

On the petition of Georgia L. Everett of Boston, in said County, the wife of Edward Everett, of said Boston, praying that said Court will make such order as it deems expedient concerning her support, said Edward Everett having appeared by his attorney, and

It appearing to the Court after hearing thereon, that the prayer of said petition should not be granted.

It is ordered that said petition be dismissed.

ROBERT GRANT,
Judge of Probate Court.

[Endorsed:] No. 98128, Everett *v.* Everett, Separate Support. Petition—Citation—Decree. Filed Feb. 21, 1895. Returnable Mch. 21, 1895, Allowed Mch. 25, 1897. Recorded Vol. 725, Page 40.

For Petitioner: Freeman Hunt, 23 Pemberton Square, Boston.
For Respondent: J. O. Shaw, Jr., 31 State St.

SUFFOLK, *ss:*

——, A. D. 189–.

Let attachment issue as prayed for, to the amount of —— Dollars.

——,
Judge of Probate Court.

No. 98128.

GEORGIA L.
vs.
EDWARD EVERETT.

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COPY SPECIFICATIONS FILED BY THE PLAINTIFF IN THE SUIT IN THE PROBATE COURT, DEFENDANT'S EXHIBIT M 1.

And your petitioner for specifications sets forth the following facts:

That she was married on or about Octo. 31, 1884 in Brooklyn, N. Y., by John Courtney, Esq., Justice of the Peace.

And further that a legal marriage according to the laws of the State of N. Y. was entered into in that State between your petitioner and said Edward Everett on or about the 15th day of April, A. D. 1888, by mutual consent and consummation and acknowledgment and cohabitation in that State; and such consent acknowledgment and cohabitation continued in that State and also in this Common-

wealth from the said 15th day of April 1888 to the 30th day of May 1891 at which time he deserted her and said marriage is still of legal force and effect.

That your respondent deserted your petitioner on or about the 30th day of May 1891 and has contributed nothing to her support since that time.

FREEMAN HUNT,
Att'y for Pet.

* * * * * * *

531 *Deposition of Freeman Hunt, Read by the Plaintiff.*

FREEMAN HUNT, of Cambridge, in the County of Middlesex and the Commonwealth of Massachusetts, aged forty-five years, being duly and publicly sworn, pursuant to the directions hereto annexed, and summoned on the part of the plaintiff, doth depose and say as follows:

By Mr. VAN STEENBERGH:

My name is Freeman Hunt. My age is forty-five. My residence is Cambridge. I am a lawyer. I was admitted January 13, 1882. I have represented the plaintiff in this matter professionally. I cannot say for how long. She saw my law associate Judge McIntire first, and I think I have had charge of her matters here for
532 the past three or four years; it may be longer. I remember a proceeding which was instituted by her in one of the Courts of this Commonwealth some time ago. I appeared as the attorney of record in that matter. That proceeding was a petition for separate maint*ai*nance; a statutory petition. I don't think the petition was obliged to be verified; my impression is the statute requiring an affidavit came after that petition was brought; that I would not swear to, though. The statute may have existed at the time requiring them to be sworn to. We brought a petition and filed it in Court for separate maint*ai*nance, and a citation was served on the defendant Edward Everett, and sometime after it was brought, I learned of this decree of annulment. I believe there was an answer interposed by the defendant in that proceeding. C. C. Read and a man named Shaw appeared as the attorneys for the defendant—John O. Shaw, Jr. I have not examined the pleadings since that time, but my impression was that they set up the fact of the existence of a decree of annulment of marriage, and that therefore, that was a bar to the proceedings. There was some other specific defenses set up besides that. No written answer is required in that Court, you understand. I think a written answer in that particular petition, but no written answer is required; everything is open on the defense. No testimony was taken to support the allegations of my petition. The petition was dismissed, but if this decree of annulment should be set aside on this bill in equity pending in New York, we were to bring a new petition. At that time there had been no bill in equity filed in New York. This petition was not dismissed upon the merits. Judge Robert Grant disposed of this matter. Mr. Read, Mr. Shaw and myself went before him and it was stated that this decree of annulment

existed in the records of the courts of New York, and it was agreed that it should be dismissed. At that time I made a suggestion that it should be dismissed without prejudice. Judge Grant stated—he did not say anything on that—in case that decree of annul-
533 ment should be set aside, of course he would entertain another petition. That is it substantially. Under that statute that is not construed as an adjudication. That statute is a statute providing for separate maintenance when husband and wife are living apart with justifiable cause, and the main issue is not whether they are husband and wife—of course that must be maintained—but the main issue is the question of justifiable cause. For instance, in the case of a petition of that kind it may be proved that they are husband and wife, and yet the wife may not be entitled to maintain her petition because she may be living apart from her husband without justifiable cause, and that is the main issue in these cases. After that had been done I recommended the bringing of a bill or an action in New York for the purpose of setting aside that decree.

Cross-examination by Mr. ZABRISKIE:

I recollect that in the course of that proceeding a motion was made by the defendant that the plaintiff be required to file specifications showing the time and the place of the alleged marriage. That motion was argued and granted. The specifications were prepared by me and filed. They were prepared under the instructions of the plaintiff, or what I got from her books that she gave me containing a record of her previous proceedings. I should not say instructions from the plaintiff, but information from the plaintiff. The plaintiff furnished the matter embodied in the specifications I framed and filed. She swore to the specifications. I do not know whether it was the custom to swear to that form of petition at that time or not, but my impression now is it was sworn to. I have not looked at these specifications for years. I do not think I have looked at them since I filed them. I may possibly have looked at copies in running over other papers in the office, but I do not think I have looked at them since I filed them. I filed them or some one in the office filed them;
534 I won't say that I took them over there and actually filed them there. The form of a decree dismissing such a petition upon the merits would be simply "Petition dismissed" usually. That is all that would be said in the decree.

My recollection is that there was not any reservation in the terms of the decree giving leave to file a new petition. But I would like to make one explanation about that. I subsequently heard from Mr. Van Steenberg that a question of this kind was raised, about res judicata something on that line, and I went to see Judge Grant and called his attention to it. I advised the bringing of the suit which is now pending in New York under which these depositions are being taken. I had nothing to do with it except giving advice. I did not advise what form the suit should take. I simply referred it to Mr. Van Steenberg, and advised generally that the decree of annulment should be attacked on the ground of fraud, and gave her some advice, perhaps, as to residence and jurisdiction. I got the

idea of fraud from reading her affidavit, which was filed in the motion to vacate the judgment, partly from that, and then I questioned her a little more specifically on that, and the further facts she gave me, combined with what I read, I advised her, perhaps, that that would be the proper course. The plaintiff first saw my partner, my law associate, Judge McIntire. I think she was sent to see him by a cousin of hers, Mr. William T. Dyer, of Stoughton. If he is living now he is living in Stoughton or Braintree. I say Stoughton, because we had a suit for him against the town of Stoughton and were successful in it, and he referred her to us. On the hearing on this petition I did not argue that the judgment annulling the marriage in New York was not a bar to the prosecution of the proceeding here for separate maintenance. I merely stated that I thought even if that annulment proceeding did exist there might still be evidence that they had lived together as a common-law wife in the State of New York and revived the marriage relations. I made that statement as I recollect. I did not offer any proof of any common-law marriage. I offered no proof whatever; there was no
535–538 proof. All the proof which was offered was from the other side in regard to this record. That was all they produced —the record of annulment. I want to say I am not certain whether they produced that record, or whether I said we will admit that and let the petition be dismissed, and with that understanding Judge Grant made the statement that it might be renewed in case that judgment was set aside. The decree which was made in the proceeding reads: "It appearing to the Court after hearing thereon that the prayer of said petition should not be granted, it is ordered that said petition be dismissed." The question I want to ask you is this. That language does not necessarily import a decree on the merits. It may be that they were living apart from each other without justifiable cause; it does not necessarily. That may be one question that might be determined, but it is not necessary to the question upon which to found a decree of dismissal. The language of this decree is not apt language to use if the proceeding was dismissed upon the merits; not in this statutory form of proceeding. If I wished to express in a decree that it was merely equivalent to nonsuit, and was not an adjudication of the issue, I should prefer to say, "Petition dismissed without prejudice," and that is what I suggested at the time, but Judge Grant said he did not think that was necessary; that under these proceedings it was his opinion that I could proceed again if this decree of annulment was set aside. This decree was final as far as it went, as I understood. It put an end to that proceeding. No, it was final with the reservation that I made.

* * * * * * *

539 Supreme Court, Kings County.

GEORGIA L. EVERETT, Respondent,
against
EDWARD EVERETT, Appellant.

It is hereby stipulated between the respondent and appellant herein that the foregoing are correct copies of the judgment roll, notice of

appeal and case on appeal as settled and filed herein, and certification of the same by the Clerk of this Court is hereby waived under Section 3301 of the Code.

W. H. VAN STEENBERGH,
Attorney for the Respondent.
ZABRISKIE, BURRILL & MURRAY,
Attorneys for the Appellant.

540 Supreme Court, Appellate Division, Second Judicial Department.

Present: Goodrich, P. J., Bartlett, Woodward, Hirschberg, and Hooker, JJ.

GEORGIA L. EVERETT, Respondent,
against
EDWARD EVERETT, Appellant.

Appeal from a Judgment in favor of the Plaintiff, Entered upon a Decision Made at Kings Special Term.

George Zabriskie, for the appellant.
W. H. Van Steenbergh, for the respondent.

GOODRICH, *P. J.:*

The defendant appeals from a judgment entered after a trial at Special Term, annulling a judgment of the Supreme Court entered April 9, 1888, by which the marriage of the plaintiff to the defendant was declared void.

There have been three appeals in the present action, the first from an order denying the defendant's motion to set aside an order for the service of the summons by publication (22 App. Div. 473), the second from an order granting the plaintiff leave to serve an amended complaint (48 App. Div. 475), and the third from a judgment dismissing the complaint after a trial at Special Term (75 App. Div. 369). The opinion in the case last cited states quite fully the facts involved in the controversy between the parties, and it is not essential to repeat them. It is sufficient to say that the wife brought
541 this action for the purpose of setting aside a judgment of this court, entered in an action brought against her by the husband in April, 1888. That judgment annulled a marriage of the parties entered into at the city of Brooklyn before John Courtney, a justice of the peace, on the ground that the wife previously to the marriage in question had contracted a marriage with one Morrison in Providence, Rhode Island, and that said Morrison was still living. The wife alleged that she was deceived by the representations and promises of her husband and was thereby persuaded and prevented from defending such action, that in fact there was no previous actual marriage with Morrison; that when she was sixteen years of age, at a social gathering at Providence, Rhode Island, in a spirit of fun, a sham marriage ceremony was performed but the same was illegal by the laws of Rhode Island and was null and void.

The decision of the court, based upon sufficient evidence, was that the husband, intending to mislead his wife, knowingly made to her false and fraudulent representations as to the effect and object of the action which he had brought against her, and that such statements were made for the purpose of inducing her to abstain from defending the action, and that the wife, believing such statements to be true, abstained from defending the action.

We must not lose sight of the fact that the effect of the judgment in the present action is merely the vacation of the judgment in the action brought by the husband against the wife, leaving that action still pending, and that the parties will have opportunity of trying out any defense which the wife may have to her husband's cause of action as set out in the complaint. It is not essential in our disposi tion of the present appeal to express, and we do not express, any opinion as to the merits of the controversy between the parties.

The judgment should be affirmed.

542 SUPREME COURT, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT.
CLERK'S OFFICE, BOROUGH OF BROOKLYN, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the opinion made by said court upon the appeal in the above entitled action, and filed in my office on the 30th day of December, 1903, and that the same is a correct transcript thereof and of the whole of the said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 17th day of February, 1904.

[SEAL.] JOHN B. BYRNE, *Clerk.*

At a term of the Appellate Division of the Supreme Court held in and for the Second Judicial Department at the Borough of Brooklyn, on the 30th day of December, 1903.

Present: Hon. William W. Goodrich, Presiding Justice. Hon. Willard Bartlett, Hon. John Woodward, Hon. Michael H. Hirschberg, Hon. Warren B. Hooker, Justices.

GEORGIA L. EVERETT, Respondent,
vs.
EDWARD EVERETT, Appellant.

Order of Affirmance on Appeal from Judgment.

The above named Edward Everett the defendant in this action having appealed to the Appellate Division of the Supreme
543 Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 6th day of March, 1903, and the said appeal having been argued by Mr. George Zabriskie of Counsel for the appellant and by Mr. W. H. Van Steenbergh of Counsel for the respondent, and due deliberation

having been had thereon, and the Court having unanimously decided that the findings of fact are supported by the evidence.

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter, WILLARD BARTLETT,
Justice Appellate Division.

Supreme Court, Kings County.

GEORGIA L. EVERETT, Plaintiff,
against
EDWARD EVERETT, Defendant.

Judgment, January 7th, 1904.

The appeal herein from the Judgment entered in this action in the Clerk's Office of the County of Kings, on the twenty-seventh day of February, 1903, having been determined and an Order having been entered herein affirming said Judgment in all respects with costs, now on motion of W. H. Van Steenbergh, Attorney for the plaintiff, it is

Ordered and Adjudged that the said Judgment of date February 27th, 1903, in favor of the plaintiff, be and the same
544 hereby is in all respects affirmed with One hundred & twenty-two & 85/100 Dollars costs to the said plaintiff and against the above named defendant.

EDWARD KAUFMANN, *Clerk.*

Supreme Court, County of Kings.

GEORGIA L. EVERETT
against
EDWARD EVERETT.

You will please take notice that the defendant Edward Everett hereby appeals to the Court of Appeals for the State of New York from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department entered in the office of the Clerk of the County of Kings on the 7th day of January, 1904, affirming a judgment herein of date February 27th, 1903, in favor of the plaintiff, entered in the office of the Clerk of the County of Kings, March 6, 1903, and from each and every part of the said judgment.

Dated, New York, February 15, 1904.

Yours etc.,

ZABRISKIE, BURRILL & MURRAY,
Attorneys for Defendant.

Office and Post-Office Address, 49 Wall Street, Borough of Manhattan, City of New York.

To W. H. Van Steenbergh, Esq., Attorney for plaintiff, and Edward Kaufmann, Esq. Clerk of the County of Kings.

O. K.

G. H. S.

545 STATE OF NEW YORK, *County of Kings, ss:*

I, Edward Kaufmann, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record), do hereby certify that I have compared the annexed with the original Order of Affirmance and Judgment on Appeal and Notice of Appeal filed in my office and that the same are true transcripts thereof, and of the whole of such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court this 17th day of Feby, 1904.

EDWARD KAUFMANN, *Clerk.*

STATE OF NEW YORK, *County of Kings, ss:*

I, Charles T. Hartzheim, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record), do hereby certify that I have compared the annexed with the original case on appeal in Georgia L. Everett *vs.* Edward Everett, filed in my office and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 25th day of Feb. 1907.

[SEAL KINGS COUNTY.] CHAS. T. HARTZHEIM.

Clerk.

546 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 21st day of February, in the year of our Lord one thousand nine hundred and five, before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge Presiding. W. H. Shankland, Clerk.

Remittitur, February 22nd, 1905.

GEORGIA L. EVERETT, Respondent,
ag'st
EDWARD EVERETT, Appellant.

Be it remembered, That on the 20th day of February, in the year of our Lord one thousand nine hundred and four,—Edward Everett the appellant in this action came here into the Court of Appeals, by Zabriskie, Burrill & Murray, his attorneys, and filed in the said Court a notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Georgia L. Everett, the respondent in said action, afterwards appeared in said Court of Appeals by W. H. Van Steenbergh her attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this
547 cause argued by Mr. George Zabriskie of counsel for the appellant, and by Mr. W. H. Van Steenbergh of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the Judgment of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is reversed and complaint dismissed, upon the merits, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said Judgment be reversed and complaint dismissed upon the merits, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office, Albany, February 22nd, 1905.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

[L. S.] W. H. SHANKLAND, *Clerk.*

O. K.
J. F.

STATE OF NEW YORK,
County of Kings, ss:

I, Charles T. Hartzheim, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record), do hereby certify that I have compared the annexed with the original Remittitur filed in my office and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 12th day of M'ch 1907.

[Seal Kings County.] CHAS. T. HARTZHEIM, *Clerk.*

548 GEORGIA L. EVERETT, Respondent,

v.

EDWARD EVERETT, Appellant.

1. RES ADJUDICATA—FOREIGN JUDGMENT. A judgment of a foreign state denying a petition by an alleged wife for maintenance and support, in which the defense was interposed that her marriage had been annulled in this state upon the ground that she had a husband living at the time she contracted the marriage, is a bar to the maintenance of an action by her to set aside the decree of annulment, for leave to come in and defend and for the determination of the validity of the mar-
549 riage upon the ground that she was and always had been the lawful wife of the defendant and that she was induced through his fraudulent representations to allow him to obtain the decree by default; since the foreign judgment is conclusive as to all questions involved in the proceeding and decided by the court and one of them must have been whether or not she was the defendant's wife, which must be deemed negatived by such judgment.

2. SAME—ORDER DENYING MOTION TO OPEN DEFAULT. The mere denial of a motion, however, to open the default and to be permitted to defend, although finally decided after a full hearing upon the facts, both with respect to the merits and as to the fraud claimed to have been practiced upon her, is not a bar to the maintenance of the action.

3. WHEN ACTION NOT EQUIVALENT TO MOTION TO OPEN DEFAULT. Such an action cannot be regarded as simply one to open a default in a prior suit and permit the plaintiff to answer therein where the complaint not only demands that the decree of annulment be set aside as having been procured by fraud, but that the validity of the marriage which had been nullified by that decree be determined.

4. DEFECTIVE FINDING OF FRAUD. In such an action a finding of fraud in general terms, without specifying a single act or a single statement upon which such a conclusion can be predicated, is insufficient to support a judgment in favor of the plaintiff.

Everett v. Everett, 89 App. Div. 619, reversed.

(Argued January 23, 1905; Decided February 21, 1905.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second Judicial department, entered January 7, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

George Zabriskie for appellant.

The Appellate Division disposed of the appeal upon an erroneous theory of the action.

First. By affirming the judgment they have given the plaintiff the entire ultimate relief which she claimed, while avowedly refusing in their opinion to consider whether either upon the facts or in point of law she is entitled to it. *Second.* The Appellate Division have misapprehended the scope of the action and the effect of the judgment in supposing that it is merely to vacate the judg-
550 ment in the nullity suit. (*Ross v. Wood*, 70 N. Y. 8; *People ex rel. v. Coffin*, 7 Hun, 608; 12 Hun, 469; 3 Pom. Eq. Juris. § 1365; *Archibald v. N. Y. C. & H. R. R. R. Co.*, 157 N. Y. 574; *Otten v. M. R. R. Co.*, 150 N. Y. 395, 404; *Frear v. Sweet*, 118 N. Y. 454; *Knapp v. Simon*, 96 N. Y. 284; Story's Eq. Pl. §§ 426, 428; *Richmond v. Tayleur*, 1 P. Wms. 177; *Loyd v. Mansell*, 2 P. Wms. 73; *Sheldon v. Fortescue*, 3 P. Wms. 111; *Wortley v. Burkhead*, 3 Atk. 811; *Galley v. Baker*, Cas. t. Talb. 201; *Brook v. Mostyn*, 33 Beav. 457; 2 De G. & S. 373; L. R. [4 H. L.] 304; *Patch v. Ward*, L. R. [3 Ch. App.] 203.) The judgment is not supported by the findings of the trial court, either with regard to the validity of the plaintiff's marriage to the defendant or with regard to the fraud imputed to the defendant in the proceedings in the nullity suit, or with regard to defendant's plea of acquiescence and laches. (Code Civ. Pro. § 1022; *Callanan v. Gilman*, 107 N. Y. 360; *Van Slyck v. Hyatt*, 46 N. Y. 259; *Rogers v. Beard*, 20 How. Pr. 282; *Tomlinson v. Mayor, etc.*, 23 How. Pr. 452; *Wright v. Delafield*, 25 N. Y. 266; *Southwick v. F. Nat. Bank*, 84 N. Y. 420; *Day v. Town of New Lots*, 107 N. Y. 148; *Romeyn v. Sickels*, 108 N. Y. 650; *Reed v. McConnell*, 133 N. Y. 425; *Bradt v. Krank*, 164 N. Y. 515; *Kley v. Healy*, 149 N. Y. 346; *Shaffer v. Martin*, 20 App. Div. 304.) The finding of fraud is insufficient to support the judgment within the issues. The court has not found that the defendant made any of the representations alleged in the complaint, and the plaintiff has not charged that the defendant made any of the representations found by the court. (*N. Y. T. Co. v. Tyroler*, 25 App. Div. 161; *Shotwell v. Dixon*, 163 N. Y. 43; *Lopez v. Campbell*, 103 N. Y. 340; *Constant v. University of Rochester*, 133 N. Y. 640; *Morris v. Talcott*, 96 N. Y. 100; *Diefendorf v. Gage*, 7 Barb. 20; *Reed v. C. C. G. Co.*, 47 Hun. 410; *Henry v. Sutfe*, 42 Fed. Rep. 91; *Clongle v. Holden*, 115 Mo. 351; *Duncan v. Lyon*, 3 Johns. Ch. 351.) The court below erred in holding that the order of the General Term denying plaintiff's motion in the nullity suit to vacate the decree for fraud, is
551 not *res adjudicata* upon the issues in this action. *Pollock v. Pollock*, 71 N. Y. 137; *Eaton v. Wells*, 82 N. Y. 576; *Everett v. Morrison*, 69 Hun, 146; *Olcott v. Tioga R. R. Co.*, 26 Barb. 147; *Burt v. Powis*, 16 How. Pr. 289; *Moore v. City of Albany*, 98 N. Y. 396; *Dwight v. St. John*, 25 N. Y. 203; *Demarest v. Darg*, 32 N. Y. 281; *Brown v. Mayor, etc.*, 66 N. Y. 385; *Riggs v. Purcell*, 74 N. Y. 370.) The court below erred in holding that the decree of the Probate Court at Boston dismissing plaintiff's petition for separate maintenance by the defendant, is not *res adjudicata* upon the issues in this action; and in so holding it failed to give to that decree the full faith and credit which under the Constitution of the United States belongs to it. (*Everett v. Everett*, 75 App. Div. 369; *Kerr v. Kerr*,

41 N. Y. 272; *Kinnier v. Kinnier*, 45 N. Y. 535; *Wood v. Jackson*, 8 Wend. 1; *Kerr v. Hays*, 35 N. Y. 331; *Smith v. Smith*, 79 N. Y. 634; *Carleton v. Lombard*, 149 N. Y. 137; *Baker v. Rand*, 13 Barb. 15[illegible]; *M'Elmoyle v. Cohen*, 13 Pet. 312; *Mills v. Duryee*, 7 Cr. 481; *H[illegible]ston v. McConnell*, 3 Wheat. 234; *Dobson v. Pearce*, 12 N. Y. 156; *Revere Copper Co. v. Dimock*, 90 N. Y. 33.)

W. H. Van Steenbergh for respondent.

The defendant's contention that the proceeding taken in the Probate Court in Massachusetts was *res adjudicata* has been effectually disposed of on a former appeal. (*Everett v. Everett*, 75 App. Div. 369; *Genet v. D. & H. Co.*, 170 N. Y. 278.) The decree annulling the marriage of date April, 1888, cannot be held to be *res adjudicata*, and the Supreme Court has power to vacate and set aside its own judgments, if it appears that they have been obtained by fraud. (*Bradstreet v. Ins. Co.*, 3 Sumn. 604; *Blank v. Blank*, 107 N. Y. 91; *Howell v. Mills*, 53 N. Y. 322; *Keck v. Werder*, 86 N. Y. 264; *Hills v. Hermans*, 59 N. Y. 396; *Dwight v. St. John*, 25 N. Y. 203; *Matter of Livingston*, 34 N. Y. 555; *Simons v. Hart*, 14 Johns 63; *Van Rensselaer v. Sheriff*, 1 Cow. 501; *Dolfus v. Frosch*, 5 Hill, 493; *Mack v. Patchin*, 29 How. Pr. 29; 42 N. Y. 167; *Riggs v. Pursell*, 74 N. Y. 370.) The fraud and deception practiced by the defendant upon the plaintiff was clearly established. (*Hunt v. Hunt*, 72 N. Y. 227; *Finn v. Finn*, 62 How. Pr. 83; *Abegg v. Schwab*, 31 N. Y. S. R. 139.)

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O'Brien, *J.*:

In this action the plaintiff sought to set aside a judgment which the defendant had procured against her in the year 1888. The allegations of the complaint in substance are that the judgment was procured by the defendant against the plaintiff by fraud. The courts below have impeached the judgment for fraud and have set it aside.

The appeal presents one of those matrimonial tangles involving numerous contradictions and intricacies. The record contains a mass of testimony, oral and written, which we may not deal with, since the learned court below was unanimous in its decision vacating the judgment. We will in this review deal only with certain questions that arise upon conceded facts, or upon the pleadings, or that have been found by the trial court, and with the exceptions taken to the decision of the trial court upon questions of law. It will require some time and space to state the facts involved in the questions presented in such a way as to make our conclusions intelligible. Some minor questions that were the subject of controversy at the trial need not be referred to. The testimony at the trial discloses numerous contradictions and conflicts, but we think it has little, if any, bearing upon the questions of law that ought to control the case.

On the 30th of October, 1884, the plaintiff and defendant were married by a justice of the peace in Brooklyn. There is no dispute about the fact that a marriage ceremony was performed which was valid in the eye of the law, providing that the parties were qualified to enter into such a contract. It has been found that in December, 1887, the defendant, that is, the husband, commenced an action in

the Supreme Court against the plaintiff, the wife, to annul the marriage between the parties. That thereupon such proceedings were had that a judgment was rendered on April 9th, 1888, whereby it was adjudged that no valid contract of marriage had been
553 entered into between the plaintiff and defendant, and that the marriage contract entered into between them on October 30th, 1884, was void, and that the said marriage be, and the same by said judgment was, annulled. The judgment so procured annulling the marriage was based entirely upon the ground that at the time of the ceremony before the justice of the peace in Brooklyn, the plaintiff in this action, that is, the wife, had another husband living, and the testimony of that person was taken at the trial of the present action. A certified copy of the judgment annulling the marriage was served on the wife, plaintiff in this action, on the 3rd day of June, 1888.

On the 27th day of May, 1892, nearly four years after the entry of the judgment, the plaintiff herein made a motion to the court in which the judgment was rendered showing that the judgment had been obtained by default, and that she was induced to abstain from defending the same by reason of false and fraudulent representations on the part of her husband, the defendant herein. There is no dispute about the fact that in the action resulting in the judgment the wife made no defense, but the allegations of the complaint were, under the practice of the court, referred to a referee to take testimony as to the facts and report the same to the court. A full hearing was had before the referee. Witnesses were examined and the testimony reported to the court, with the referee's conclusions, to the effect that that prayer of the complaint should be granted. This report was confirmed and judgment ordered for the plaintiff in the action. The application of the wife to open the judgment and to be permitted to defend was fully heard at a Special Term of the court; all the facts bearing upon the merits of the action and upon the allegations of fraud on the part of the husband were fully presented on both sides by affidavits, and the court granted the motion, opened the judgment and allowed the wife to come in and defend; but the husband appealed from this order to the General Term, where the case was fully heard, and the order of the Special Term was reversed and the application of the wife denied. Subsequently a
554 motion was made to the General Term for a reargument, which was denied on the 10th of May, 1893.

On the 21st of February, 1895, the wife commenced a proceeding against the husband in the Probate Court for Suffolk county, in the state of Massachusetts, alleging in her petition that she was the defendant's wife, and that he without just cause failed to furnish suitable support for her and had deserted her, and that she was living apart from him for justifiable cause, and in her prayer for judgment she asked that the court make such order as it deemed expedient concerning her support. Pursuant to an order made by the court the plaintiff in that proceeding filed specifications stating that she was married to the defendant on October 31st, 1884, and, further, that a legal marriage according to the laws of the state of New York was entered into in that state between her and the defendant on

April 15th, 1888. This last marriage is what was termed in the case a common-law marriage. It was also alleged in the petition that the defendant had deserted her on the 30th day of May, 1891, and had since contributed nothing to her support. The husband, who is the defendant in this action, admitted the early marriage and alleged that the same had been declared null and void by the judgment hereinbefore referred to, and further alleged that at the time of the marriage, and also at the time of the alleged subsequent common-law marriage, the plaintiff herein was the wife of another man, giving his name, and that by reason thereof both the supposed marriages between the plaintiff and the defendant, by her alleged, were null and void. On the 25th of March, 1897, the court made a decree whereby it found and decided that the prayer of the plaintiff's petition should not be granted and adjudged that the petition be dismissed, and a few days thereafter the present action was commenced. It seems that there have been three trials and three appeals to the Appellate Division in which some feature of the case has been referred to. (*Everett v. Everett*, 48 App. Div. 475; 75 *id.* 369; 89 *id.* 619.)

In the defendant's answer in this action he sets forth cer-
555 tain adjudications which he claims were conclusive against the right of the plaintiff to maintain this action. These adjudications are the judgment annulling the marriage, the order made upon the motion to set this judgment aside and to permit the wife to come in and defend and the decree entered in the Probate Court in Massachusetts upon the wife's application to compel the husband to furnish support. Perhaps the most important question of law in this case arises upon these defenses. They were disposed of by the learned trial court in his eighth finding of fact which is in the following words: "That the matters set forth in the second, third and fifth defenses, or either of them, in the answer therein are not *res adjudicata* as to the issues herein." Although this purports to be a finding of fact, it is clearly nothing but a conclusion of law. It expresses the decision of the trial court on a matter of law and not upon a matter of fact. It is substantially the decision of the court that these defenses are not available to the defendant herein. The question presented on this ruling is substantially the same as if the plaintiff had demurred to these several separate defenses on the ground that in law they constituted no defense to the action. This finding was excepted to by the defendant and this exception presents the question whether the disposition made by the learned trial court of these several defenses was correct. We think it was not, at least as to one of them, for the reason which must presently be stated.

The Massachusetts judgment was based upon the petition of the wife and it was founded upon the allegation that she was the defendant's wife; that he had deserted her and had failed to contribute to her support. These allegations of fact were put in issue by the defendant and must have been determined by the court. An exemplification of the judgment record in the action which annulled the marriage was presented to the Probate Court and admitted in evidence. The court had jurisdiction of the parties and the subject-

matter of the controversy and its judicial power extended to every material question in the proceeding. The determination of
556 the court that the plaintiff was not entitled to the relief demanded in her petition must be deemed to have included the question as to the validity of her marriage. In other words, the court must have determined the question whether the petitioner was in fact the defendant's wife, and this involved an inquiry with respect to the question whether at the time of her marriage before the justice of the peace in Brooklyn she had another husband living. There was evidence before the court on that question, since the record of the judgment annulling the marriage in this state was before it. That judgment of a sister state was entitled in the present action to full faith and credit under the Constitution of the United States, any statute, rule or procedure or even any constitutional provision in any state to the contrary notwithstanding. The provision of the Federal Constitution with respect to the force and effect to be given to the judgments of other states, and the act of Congress passed in pursuance thereof, is the supreme law of the land, and any statute or rule of practice in this state that would tend to detract or take from such a judgment the force and effect that it is entitled to under the Federal Constitution and in the state where rendered must be deemed to be inoperative. So we think that that judgment was conclusive upon the parties to this action with respect to all the questions which were involved in the proceeding and decided by the court, and clearly one of those questions was the status of the present plaintiff. She alleged that she was the defendant's wife, and this allegation must be deemed to have been negatived by the decision in the proceeding. The case of *Genet v. D. & H. Canal Co.* (170 N. Y. 278) has no application, since it appears from the exemplified record of the proceeding in the Probate Court that the parties appeared and joined issue and a full hearing was had upon the questions of fact and law involved. The court decided that the prayer of the petition should not be granted, and it is of no consequence that the judgment took the form of an order that the petition be dismissed. The case of *Deeley v. Heintz* (169 N. Y. 129) has more application. In that case it was held that inasmuch as it appeared from the record that
557 the questions were fully litigated and findings made that it was a judgment on the merits and not a nonsuit that permitted the questions to be tried again. In such cases, whatever may be the form in which the judgment is expressed, it is generally a bar to another litigation involving the same questions.

The decision of the motion made upon the plaintiff's application to open the former judgment and to be permitted to defend we think stands upon a different ground. At the time that motion was made there was no issue in the action to be tried, since the defendant therein had made default and the only purpose of the motion was to open that default and to give her an opportunity to make an issue in the case by the service of an answer. Although that motion was in the end decided against her after a full hearing upon the facts, both with respect to the merits of her defense and to the question of fraud which she claimed had been practiced upon her by the

husband in order to induce her to refrain from serving an answer, yet we think that was not such a final decision as would operate as an absolute bar to the present action. There is no doubt that the result of a litigation which takes the form of a motion may constitute a bar to another action or proceeding involving the same question. The case of *Williams v. Barkley* (165 N. Y. 48) is an authority upon that question, in which the rule is stated from the adjudged cases and the elementary books. But the question with respect to the effect of an adjudication upon a motion must always depend upon the nature of the proceeding. A motion to open a default for any reason is generally addressed to the discretion of the court, and is in its nature interlocutory. Such a motion can never result in a decision of the issues involved in the controversy, since it is always predicated upon the fact that the defaulting party has lost the opportunity to present the issue to the court, and the question always is whether the party applying should be permitted to plead.

There is another consideration which we think is conclusive with respect to the character and effect of the order which denied
558 the plaintiff's application for leave to answer. Estoppels must be mutual, and the order denying the application for leave to answer cannot be held to constitute a bar to the present action unless, if it had been decided the other way, it would have operated as a bar against the husband, the defendant in this action. In other words, if, instead of granting the plaintiff's motion at the Special Term, the court had denied it on the ground that she had no defense, and that there was no fraud, but that decision had been subsequently reversed by the General Term on the ground that she had a defense, which she was fraudulently prevented from interposing, it would not, we think, be claimed that any such result would be a bar to the right of the husband on the trial of the action to contest all the issues in this case. In that aspect the order would have no force except as an authority for the wife to serve the answer which she was prevented from doing by the husband's fraud, but it could not conclude the husband upon any question raised by the pleadings in the case. So we think that the final order made upon the motion to open the default and for leave to answer was not a bar to this action, although, of course, all the disputed questions of fact involved in this case were necessarily passed upon, but not in such a way or under such circumstances as to prevent the plaintiff from relitigating the questions in the form of action which she had instituted. (*Rudd v. Cornell*, 171 N. Y. 127-131.)

There is another question in this case which to a very large extent pervades all the reasoning, and is involved in most of the judicial action of the learned courts below, and that is that this is simply an action to open the plaintiff's default in the prior suit and to reinstate her in her original right to defend. In other words, the judgment in this action is sought to be limited in its scope to the purpose for which the motion was made. This, we think, is an erroneous view of the scope of the action and the effect of the judgment. The complaint not only demands that the judgment be set aside as having been procured by fraud, but that the validity of the marriage which

had been nullified by that judgment be determined and
559 declared, and the learned trial court not only set aside the judgment, but decreed that the marriage contracted between the plaintiff and the defendant is still binding and in full force and effect. The judgment in this case not only sweeps away the former judgment and completely disposes of that action, but it determines, affirmatively, that the plaintiff is still the defendant's wife. The only remedy that the defendant can avail himself of hereafter is to bring a new action, and to that action the judgment in this case would be a complete and conclusive bar. So that the present action involved not only the question of fraud in the former judgment, but the validity of the very marriage that that judgment nullified.

Although the judgment of the learned court below was unanimous, still the question is open in this court whether the conclusions of law are supported by the facts found, and whether the exceptions taken present such errors of law as are fatal to the judgment. We have already pointed out what seems to us to be the effect of the former litigations involving the same questions that were litigated in this case. The question of actual fraud on the part of the defendant occupies an important place in the controversy. Much evidence was given at the trial on that question. The allegations of the complaint are full and specific as to the fraud which it is claimed the defendant perpetrated upon the plaintiff. The complaint alleges that about the year 1887 the defendant, with fraudulent intent and for the purpose of misleading and deceiving the plaintiff, represented that his family would never recognize a marriage performed by a justice of the peace, and that a ceremonial marriage would have to take place before a minister of the gospel; that it was necessary to have the marriage ceremony performed by the justice of the peace annulled and set aside; that after that had been done the defendant would have a ceremonial marriage performed by a regularly ordained minister of the gospel; that the proceedings to annul the marriage would be merely formal; that the plaintiff need not give the same any attention whatever; and that the defendant would look after all
560 the details; that it would not be necessary for her to peruse any papers which might be served upon her, or engage counsel to represent her. None of the facts so alleged were found by the learned trial court, and the findings in this case are entirely silent as to what, if anything, the defendant did or said that induced the plaintiff to forbear defending the action. The finding is in these words: "That the defendant herein, intending to mislead this plaintiff, made to this plaintiff false and fraudulent representations, knowing them to be false, concerning the nature, effect and object of the said action, for the purpose of inducing this plaintiff to abstain from defending the said action, and that the plaintiff, believing the said false and fraudulent representations to be true, did abstain from defending the said action." Although this finding seems to be quite sweeping and comprehensive in its language, it does not contain a single specific fact which justified the conclusion that the defendant had been guilty of fraud in procuring the judgment. It is nothing more than a mere conclusion without any facts to sustain it. The

plaintiff sought to impeach a judgment recovered against her many years before. In such an action we think it is not sufficient to find fraud in general terms without specifying a single act or a single statement upon which such a conclusion could be predicated. In an action where fraudulent acts and statements are charged, the general conclusion of law that the defendant was guilty of fraud is not sufficient to support the judgment.

There are many other questions in this case which have been discussed at length upon the argument and are to be found in the briefs of the respective counsel, but it is unnecessary to consider them. We think that the judgment must be reversed, and as there appears to be at least one conclusive obstacle to the plaintiff's success, a new trial would be useless, and so the complaint should be dismissed upon the merits.

HAIGHT, *J.*:

I favor reversal of the judgment and new trial in this action and concur to that extent with the opinion of O'Brien, J., except
561 in one particular. I do not think that the Massachusetts judgment, so called, is *res adjudicata* of the issues involved in this action. In that case the plaintiff had petitioned the Probate Court of the county of Suffolk, in the commonwealth of Massachusetts, to compel the defendant, whom she alleged to be her husband, to make provision for her support. In answer thereto the defendant denied that he was her husband, and set up the decree of divorce obtained in this state annulling his marriage to her. Thereupon the judge of the Probate Court ordered that the plaintiff's petition be dismissed. Whether the decree of divorce in this state was obtained through false and fraudulent representations does not appear to have been alleged or litigated in those proceedings. The judge of the Probate Court was, therefore, obliged to give full faith and credit to the judgment and decree of the courts of this state, under the Constitution of the United States. (*Kerr v. Kerr*, 41 N. Y. 272.) Whether the Probate Court had jurisdiction to try the question as to whether the New York judgment was obtained through false and fraudulent representations it is not necessary to now determine, in view of the fact that that issue was not raised or determined in those proceedings. The court simply dismissed the petition. It does not appear even that it was dismissed upon the merits. It seems to me, therefore, that the determination in those proceedings does not preclude the plaintiff from bringing this action to set aside the decree of divorce upon the ground that it was obtained through false and fraudulent representations by the defendant. (*Everett v. Everett*, 75 App. Div. 369.)

Gray, Bartlett, Vann and Werner, JJ., concur with O'Brien, J.; Haight, J., reads for reversal and new trial; Cullen, Ch. J., not sitting.

Judgment reversed and complaint dismissed, without costs.

562 State of New York, Court of Appeals, Reporter's Office, 33 Washington Avenue.

ALBANY, *January* 25, 1907.

GEORGIA L. EVERETT, Respondent,
v.
EDWARD EVERETT, Appellant.

I certify the foregoing to be a correct and true copy of the opinions handed down February 21, 1905, by the Court of Appeals of the State of New York in the above entitled action, and of the whole thereof.

EDWIN A. BEDELL,
State Reporter.

[Seal State of New York Court of Appeals.]

Attest: W. H. SHANKLAND,
Clerk Court of Appeals.

563 STATE OF NEW YORK:

Court of Appeals.

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest appellate court and court of record in and for said state, do hereby certify that W. H. Shankland is the Clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Edwin A. Bedell is the official Reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter, of the annexed copy of the official opinions of Dennis O'Brien and Albert Haight, Associate Judges of said Court of Appeals, written and handed down by them in the case of Georgia L. Everett, respondent, *v.* Edward Everett, Appellant, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of said Court of Appeals and that the signature of W. H. Shankland, as clerk of said court, appended thereto is the true and genuine signature of said W. H. Shankland, and the signature of Edwin A. Bedell, as reporter of said court, appended thereto is the true and genuine signature of said Edwin A. Bedell.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 25th day of January in the year one thousand, nine hundred and seven.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals of the State of New York.

[Endorsed:] 1897. No. 2028. 6 37. Filed Jan. 31, 1907.

564 At a Special Term of the Supreme Court, held at the Kings County Court House in the Borough of Brooklyn, Kings County, on the — day of March, 1905.

Present: Hon. William D. Dickey, Justice.

GEORGIA L. EVERETT
against
EDWARD EVERETT.

The defendant herein having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department entered in the office of the Clerk of the County of Kings, January 7th, 1904, affirming a judgment herein dated February 27th, 1903, entered in the office of the Clerk of the County of Kings March 6, 1903;

And the Court of Appeals having heard the said appeal and having ordered and adjudged that the said judgment of the Appellate Division of the Supreme Court be reversed and that the complaint herein be dismissed upon the merits without costs, and having ordered that the record in this cause and the proceedings in the Court of Appeals be remitted to this court here to be proceeded upon according to law.

And the remittitur from the Court of Appeals being now here before the Court, on motion of Zabriskie, Burrill & Murray, attorneys for the defendant, it is

Ordered that the remittitur from the Court of Appeals in this cause be filed in the office of the Clerk of Kings County, and
565 that the judgment of the Court of Appeals be, and the same hereby is made the judgment of this court, and that the aforesaid judgment of the Appellate Division in this cause affirming the judgment herein dated February 27, 1903, entered as aforesaid March 6, 1903, be and the same hereby is reversed, and that the said judgment dated February 27, 1903 and entered as aforesaid March 6, 1903, be, and the same hereby is reversed, and that the complaint herein be, and the same hereby is dismissed upon the merits without costs.

It is further ordered that judgment be entered in accordance with the terms of this order in the office of the Clerk of Kings County.

Enter
WILLIAM D. DICKEY, *J. S. C.*

Granted Mar. 6, 1905.
EDWARD KAUFMANN, *Clerk.*

O. K.
J. F.

STATE OF NEW YORK,
County of Kings, ss:

I, Charles T. Hartzheim, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record), do hereby certify that

I have compared the annexed with the original order of reversal filed in my office M'ch 6th 1905 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 26 day of Feb. 1907.

[Seal Kings County.]

CHAS. T. HARTZHEIM, *Clerk.*

[Endorsed:] 3-6-1905.

566 UNITED STATES OF AMERICA:

To the Honorable Supreme Court of the United States:

The petitioner, Georgia L. Everett of Boston in the Commonwealth of Massachusetts, respectfully shows that on the Sixth day of March 1905 the Supreme Court of the State of New York, in and for the County of Kings, rendered a final judgment or decree against your petitioner in a certain cause wherein your petitioner was plaintiff and Edward Everett was defendant, and wherein the plaintiff sought to set aside a prior judgment annulling a marriage between the parties, which the said Edward Everett had procured against her in said Court; that a trial of said cause was had at a Special Term in the Supreme Court within and for the County of Kings and State of New York aforesaid, upon the complaint of your petitioner, resulting in said Court finding and ordering judgment for your petitioner, as appears of record therein; that afterwards, said finding and said cause were entered in the Appellate Division of said Supreme Court, in the Second Judicial Department thereof, where said cause was duly heard and determined in favor of your petitioner, as aforesaid, and thereafter said cause was appealed and duly entered, heard and determined in the Court of Appeals of said State, and final judgment was thereafter entered in said Supreme Court of the State of New York and in and for the County of Kings in accordance with the order of said Court of Appeals, reversing the judgment of the said Supreme Court and dismissing the complaint of your petitioner upon its merits, as will appear by reference to the records and proceedings in the said cause; said Supreme Court being the highest court of law or equity in said state in which a decision in
567 said suit could be had.

And your petitioner claims the right to remove said judgment or decree to the Supreme Court of the United States by writ of error, under Section 709 of the Revised Statutes of the United States; because, in the trial of said cause, there was drawn in question a right, title, privilege or immunity claimed under the Constitution or a statute of the United States, and the decision was against the right, title, privilege or immunity specially set up and claimed under said Constitution or Statute by your petitioner in the said trial, as more particularly appears by the record of the proceedings in said cause which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error

returnable into the Supreme Court of the United States, and for a citation and supersedeas; and your petitioner will ever pray.

GEORGIA L. EVERETT,
By Her Attorneys, W. H. VAN STEENBERGH,
FRANK H. STEWART.

Let the writ of error issue, as prayed.
January, 1907.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

568 [Endorsed:] 1897 No. 2028 6/371 Georgia L. Everett Plaintiff in Error *v.* Edward Everett Defendant in Error. Petition for writ of error. Filed Jan. 31, 1907.

569 STATE OF NEW YORK:

Supreme Court, County of Kings.

GEORGIA L. EVERETT, Plaintiff in Error,
v.
EDWARD EVERETT, Defendant in Error.

Assignment of Errors.

Now comes the Plaintiff in Error and respectfully submits that, in the record, proceedings, decision and final judgment of the Supreme Court of the State of New York, in and for the County of Kings, in the matter of Georgia L. Everett, Plaintiff, *vs.* Edward Everett, Defendant, there is manifest error, to wit:

1. That the Court of Appeals of the State of New York erred in failing to give full faith and credit to the judgment, records and judicial proceedings of the Probate Court in the County of Suffolk and Commonwealth of Massachusetts, as required by Article IV, Section 1, of the Constitution of the United States.

2. That the Court of Appeals of the State of New York erred in failing to give to the judgment, records and judicial proceedings of the Probate Court in the County of Suffolk and Commonwealth of Massachusetts the force and effect which by law and usage they have in the Commonwealth of Massachusetts, as required by Section 905 of the Revised Statutes of the United States.

W. H. VAN STEENBERGH,
FRANK H. STEWART,
Attorneys for Plaintiff in Error.

570 [Endorsed:] 1897 No. 2028 6/371 Georgia L. Everett Plaintiff in Error *vs.* Edward Everett Defendant in Error. Assignment of Errors. Filed Jan. 31, 1907.

571 *Bond on Writ of Error.*

Know all men by these presents, that we, Georgia L. Everett of Boston, in the Commonwealth of Massachusetts, as principal and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, duly authorized to transact the business of indemnity and suretyship in the State of Massachusetts, as surety, are held and firmly bound unto Edward Everett of said Boston, in the full and just sum of Five hundred dollars, to be paid to the said Edward Everett, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of January, in the year of our Lord, One thousand nine hundred and seven.

Whereas, lately at a Supreme Court holden in and for the County of Kings, State of New York, in a suit depending in said Court between Georgia L. Everett, plaintiff, and Edward Everett, defendant, judgment was rendered against the said Georgia L. Everett and the said Georgia L. Everett having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward Everett, citing and admonishing him to be and appear in the Supreme Court of the United States, to be holden at the City of Washington within 30 days from the twenty-eighth day of January, 1907;

Now, the condition of the above obligation is such, that if the said Georgia L. Everett shall prosecute her said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGIA L. EVERETT. [SEAL.]

[SEAL.] FIDELITY & DEPOSIT COMPANY OF MARYLAND.

By HUGH M. ALLWOOD,
Attorney-in-fact.

Attest:

JAMES R. KINGSLEY, *Attorney.*

Sealed and delivered in presence of

HELEN W. BRADLEE.

Approved:

R. W. PECKHAM,
Asso. Jus. Sup. Ct U. S.

Not to act as a supersedeas.

572 STATE OF NEW YORK,
County of New York, ss:

On the 26th day of January, in the year 1907 before me personally came James R. Kingsley, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided, and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720 of the Session Laws of the State of New York, for the year 1893. And the said James R. Kingsley further said that he was acquainted with Hugh M. Allwood, and knew him to be the Attorney-in-Fact of said Company; that the signature of the said Hugh M. Allwood, subscribed to the within instrument, was in the genuine handwriting of the said Hugh M. Allwood, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said James R. Kingsley.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company in the City of Baltimore, State of Maryland, on the seventh day of February, A. D., 1906, on motion, it was unanimously

"*Resolved*, That Henry B. Platt, Vice-President, or James R. "Kingsley, Attorney, or Frank H. Platt, Edward T. Platt, Joseph "A. Flynn, and Hugh M. Allwood, Attorneys-in-Fact of this Com- "pany, in the State of New York, be, and each of them is, hereby "authorized and empowered to execute and deliver any and all bonds "or undertakings for or on behalf of this Company, in its business "of guaranteeing the fidelity of persons holding places of public or "private trust and the performance of contracts other than insur- "ance policies, and executing or guaranteeing bonds and other un- "dertakings required or permitted in all actions or proceedings or by "law required, and to attach thereto the seal of the Company, the "same to be attested by the said James R. Kingsley, Attorney of the "Company, or by either one of the other persons above named, as "occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney, of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company,

and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 26th day of January, 1907.

[SEAL.] JAMES R. KINSLEY, *Attorney.*

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1906.

Resources.		Liabilities.	
Real Estate	$787,000 00	Capital Stock	$2,000,000 00
Stocks and Bonds	3,395,942 00	Surplus	2,836,381 39
Railroad Bonds	1,304,000 00	Premium Reserve	700,323 91
British Consols	230,808 00	Claims Adjusted (Checks out)	2,915 71
Net Premiums Due	85,172 95	Reserve for Contingent Claims	648,948 58
Cash in Bank, etc	415,646 64		
	$6,188,569 59		$6,188,569 59

STATE OF NEW YORK,
County of New York, ss:

James R. Kingsley, being duly sworn, says that he is the Attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of Dec. 31, 1906, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 26th day of Jan., 1907.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

O. K.
G. H. S.

STATE OF NEW YORK,
County of Kings, ss:

I, Charles T. Hartzheim, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record), do hereby certify that I have compared the annexed with the original Bond filed in my office Jan. 31st, 1907, and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 1 day of Feb., 1907.

CHAS. T. HARTZHEIM, *Clerk.*

573 [Endorsed:] Georgia L. Everett and Fidelity and Deposit Company of Maryland to Edward Everett. Copy. Bond. Fidelity and Deposit Company of Maryland, 35 Wall Street, New York. 1-31-1907.

574 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York held in and for the County of Kings, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Georgia L. Everett, plaintiff, and Edward Everett, defendant in a certain cause wherein there was drawn in question a right, title, privilege or immunity claimed under the Constitution or a Statute of the United States and the decision was against the right, title, privilege or immunity specially set up and claimed under said Constitution
575 or Statute; a manifest error hath happened to the great damage of the said Georgia L. Everett as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of January, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 1897. No. 2028. Filed Jan. 31, 1907.

576 Supreme Court, Kings County.

GEORGIA L. EVERETT, Plaintiff,
vs.
EDWARD EVERETT, Defendant.

And now, here, the Judges of the Supreme Court of the State of New York in and for said County of Kings, make return of this writ by annexing hereto and sending herewith under the seal of

said Supreme Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Charles T. Hartzheim, clerk of the County of Kings and Clerk of said Supreme Court, have hereto set my hand and affixed the seal of said county and Court, this 4th day of March, 1907.

[Seal Kings County.]

CHAS. T. HARTZHEIM, *Clerk.*

577 [Endorsed:] Supreme Court, Kings Co. Georgia L. Everett *vs.* Edward Everett. Return to Writ of Error.

578 UNITED STATES OF AMERICA, *ss:*

To Edward Everett, of Boston, in the County of Suffolk, and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court held in and for County of Kings, State of New York wherein Georgia L. Everett of said Boston is Plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 28 day of January, in the year of our Lord one thousand nine hundred and seven.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

579 [Endorsed:] Marshal's No. 5745. United States Marshal's Office, Room No. 101, P. O. Building, Boston, Mass. Feb. 5, 1907.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *February* 7, 1907.

I hereby certify that I have this day made service on the within-named Edward Everett by delivering to him in hand at said Boston, an attested copy of this precept.

CHARLES K. DARLING,
U. S. Marshal Mass. Dist.,
By CHARLES A. BANCROFT, Deputy.

Fees.

Service	$2.00
Travel	.06
	$2.06

580 In the Supreme Court of the United States.

GEORGIA L. EVERETT, Plaintiff in Error,

vs.

EDWARD EVERETT, Defendant in Error.

Statement of Plaintiff in Error Under Rule 10.

In pursuance of the Tenth Rule, Section 9 thereof, of this Court, the Plaintiff in Error now by her attorneys hereby states that she intends to rely on all the errors set out in the Assignment of Errors heretofore filed by her in said cause, and upon the following parts of the record which she thinks necessary for the consideration thereof, in addition to the Petition for Writ of Error, Assignment of Errors, Citation and Return thereon and Writ of Error and Return thereon; that is to say, the parts found in the printed record or volume on file, as follows:

Printed Record or Volume:	Page:
Statement under Rule 41 of Appellate Division	1
Summons	2
Amended Complaint	3
Amended Answer	9
Amended Answer	11
Reply	25
Findings of Fact	32
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581 Exceptions	35
Judgment	38
Notice of appeal to Appellate Division	39
Affidavit of No Opinion	40
Stipulation under 3301 of Code	539
Opinion	540
Certificate of Opinion	542
Order of Affirmance	542
Judgment of Affirmance	543
Notice of Appeal to Court of Appeals	544
Certificate of Clerk of King's County	545

Exemplified Copy of Proceedings in Massachusetts Probate Court, as follows:

Exemplification	252
Petition of Georgia L. Everett	254
Order that notice to appear be given	254
Motion for Specifications	254
Answer	255
Decree dismissing petition	256
Docket Entries	258
Specifications filed in Probate Court	258
Constitution of Massachusetts, Pt. II, Ch. I, § 1, Art. 3, and Pt. II, Ch. III, Art. 4	249
Public Statutes of Massachusetts 1882, Ch. 156	250

Deposition of Freeman Hunt..... 531
Deposition of John O. Shaw..... 216
Deposition of Charles C. Read..... 228
Deposition of Walter T. Hannigan..... 234
Deposition of Elijah George..... 235

Also, the certified copy of the Opinion of the Court of Appeals of the State of New York, the Remittitur from said Court of Appeals, and the Judgment upon the Remittitur.

And the Clerk is hereby requested to print said parts of the record, accordingly.

FRANK H. STEWART,
M. H. VAN STEENBERGH,
Attorneys for Plaintiff in Error.

582 [Endorsed:] No. 650. U. S. Supreme Court. Georgia L. Everett, Plaintiff in Error, *v.* Edward Everett, Defendant in Error. Statement of Plaintiff in Error, under rule 10.

583 [Endorsed:] File No. 20615. Supreme Court U. S. October Term, 1906. Term No. 650. Georgia L. Everett, Plff in Error, *vs.* Edward Everett. Designation by plff in Error of parts of record to be printed. Filed May 13th, 1907.

584 In the Supreme Court of the United States.

GEORGIA L. EVERETT, Plaintiff in Error,
vs.
EDWARD EVERETT, Defendant in Error.

Statement of Plaintiff in Error Under Rule 10.

In pursuance of the Tenth Rule, Section 9 thereof, of this Court, the Plaintiff in Error now by her attorneys hereby states that she intends to rely on all the errors set out in the Assignment of Errors heretofore filed by her in said cause, and upon the following parts of the record which she thinks necessary for the consideration thereof, in addition to the Petition for Writ of Error, Assignment of Errors, Citation and Return thereon and Writ of Error and Return thereon; that is to say, the parts found in the printed record or volume on file, as follows:

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Opinion 540
Certificate of Opinion 542
Order of Affirmance 542
Judgment of Affirmance 543
Notice of Appeal to Court of Appeals 544
Certificate of Clerk of King's County 545

Exemplified Copy of Proceedings in Massachusetts Probate Court, as follows:

Exemplification 252
Petition of Georgia L. Everett 254
Order that notice to appear be given 254
Motion for Specifications 255
Answer 256
Decree dismissing petition 258
Docket Entries 258
Specifications filed in Probate Court 259
Constitution of Massachusetts, Pt. II, Ch. I, § 1, Art. 3, and Pt. II, Ch. III, Art. 4 249
Public Statutes of Massachusetts 1882, Ch. 156 250
Deposition of Freeman Hunt 531
Deposition of John O. Shaw 216
Deposition of Charles C. Read 228
Deposition of Walter T. Hannigan 234
Deposition of Elijah George 235

Also, the certified copy of the Opinion of the Court of Appeals of the State of New York, the Remittitur from said Court of Appeals, and the Judgment upon the Remittitur.

And the Clerk is hereby requested to print said parts of the record, accordingly.

FRANK H. STEWART,
M. H. VAN STEENBERGH,
Attorneys for Plaintiff in Error.

586 [Endorsed:] No. 650. U. S. Supreme Court. Georgia L. Everett, Plaintiff in Error, *vs.* Edward Everett, Defendant in Error. Service of a copy of the within is hereby admitted. Dated, N. Y. May 15 1907. George Zabriskie Att'y for Def't in Error. Statement of Plaintiff in Error under Rule 10. Filed May 11/07. See upper copy. 650 20615 May 16, 07. Proof of service.

587 [Endorsed:] File No. 20,615. Supreme Court U. S. October Term, 1906. Term No. 650. Georgia L. Everett P. E. *vs.* Edward Everett. Proof of service of designation of parts of record to be printed. Filed May 16", 1907.

Endorsed on cover: File No. 20,615, New York, supreme court. Term No. 40. Georgia L. Everett, plaintiff in error, *vs.* Edward Everett. Filed March 13th, 1907. File No. 20,615.

Supreme Court of the United States.

OCTOBER TERM, 1909.

GEORGIA L. EVERETT, *Plaintiff in Error*

v.

EDWARD EVERETT, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

I. STATEMENT OF THE CASE.

This cause comes up on writ of error to the Supreme Court of the State of New York to review a final judgment entered pursuant to a mandate of the Court of Appeals of that State, reversing the judgment of the Appellate Division of the Supreme Court of the Second Department, which affirmed the judgment of the Supreme Court, County of Kings, in favor of the plaintiff in error, setting aside a judgment which the defendant in error had procured against her in nullity proceedings, and in which proceedings a Massachusetts decree in a suit for separate maintenance was pleaded as *res adjudicata*.

The questions of law involved are:—

First. Whether the Court of Appeals of New York gave full faith and credit to the decree of the Probate Court of Massachusetts.

Second. Whether the said Court of Appeals gave to said probate decree the force and effect which by law and usage it had in Massachusetts.

For the sake of brevity the plaintiff in error will be here called the "wife," or "plaintiff," and the defendant in error the "husband," or "defendant."

In April, 1888, the husband, without the knowledge of the wife, obtained a decree in New York, annulling the marriage contracted between them (Rec., p. 20).

In 1895 the wife brought a petition for separate maintenance in the Probate Court of Massachusetts, alleging that she was the lawful wife of the defendant, and that he failed, without just cause, to furnish suitable support for her, and had deserted her, and that she was living apart from her said husband for justifiable cause (Rec., p. 41).

On the 25th of March, 1897, the Probate Court entered a decree dismissing the petition (Rec., pp. 43–44).

In March, 1897, the wife began an action in the Supreme Court of New York, to set aside the nullity decree entered in that Court April 9, 1888, on the ground that the same had been obtained by the fraud of the husband (Rec., pp. 1, 2).

Thereafter, issue being joined therein, the husband set up the probate decree of Massachusetts as a plea in bar (Rec., pp. 7, 14), and the wife filed reply thereto, denying, among other things, that the same issues were involved and determined in the Probate Court which were then raised in the Supreme Court of New York by the answer of the husband (Rec., p. 16).

Thereupon the Supreme Court took extrinsic evidence on the point (Rec., pp. 24–39, 45–47), and found as a fact (Rec., p. 20) that "the matters set forth under the . . . 5th defense

(viz., issues raised and determined in the Probate Court and the conclusiveness of the probate decree, Rec., p. 14) . . . in the answer herein are not *res adjudicata* as to the issues herein," and ruled that the wife was entitled to judgment, in all respects vacating and setting aside the judgment or decree of April 9, 1888, of the Supreme Court of New York, annulling the marriage between the parties (Rec., p. 21).

From this judgment the husband appealed (Rec., pp. 21–23) to the Appellate Division of the Supreme Court, which Court, on the thirtieth day of December, 1903 (Rec., pp. 40–50), affirmed the judgment of the Special Term of the Supreme Court of New York, from which latter judgment the husband appealed to the Court of Appeals (Rec., p. 50).

Thereafter said Court of Appeals, on the 21st of February, 1905, reversed the judgment of the Supreme Court, and ordered the wife's complaint dismissed upon the ground that the decree of the Probate Court in Massachusetts was *res adjudicata* of the issues in the action in the Supreme Court of New York (Rec., pp. 53–63).

II. THE DISMISSAL OF THE COMPLAINT BY THE COURT OF APPEALS FOR THE STATE OF NEW YORK WAS UPON THE GROUND THAT THE ACTION OF THE PROBATE COURT IN MASSACHUSETTS WAS A "CONCLUSIVE OBSTACLE" TO THE PLAINTIFF'S SUCCESS.

This clearly appears from the opinion of the Court (Rec., p. 61).

Were it not for this "conclusive obstacle," the complaint would not have been dismissed, but remanded, as the minority judge, who did not conceive the Massachusetts proceedings a conclusive obstacle, recommended (Rec., p. 61).

III. THIS INVOLVED THE DETERMINATION, BY THE COURTS OF NEW YORK, OF THE EFFECT IN MASSACHUSETTS OF THE ACTION OF SAID PROBATE COURT, IN ACCORDANCE WITH SECTION 1, ARTICLE IV., OF THE CONSTITUTION OF THE UNITED STATES, AND UNITED STATES COMPILED STATUTES, SECTION 905.

The Constitution of the United States provides in Section 1 of Article IV. as follows:—

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The statutes of the United States enacted pursuant to and for the purpose of carrying out this constitutional provision provide as follows:—

(United States Compiled Statutes, Section 905.)

> "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Any objection that the Act of Congress provides only for the admission in EVIDENCE of the records and judicial proceedings of the courts of other States, but does not declare the *effect* of such evidence, when admitted, was disposed of in the case of *Mills* v. *Duryee*, 7 Cranch, 481. In that case the action had been brought originally in the Circuit Court for the District of Columbia upon a New York judgment, and the Supreme Court held that a plea of *nil debit* was not a good plea. The court, after stating expressly that the argument above set forth cannot be supported, said (per Story, J., p. 484):—

> "It remains only then to inquire in every case what is the effect of a judgment in the State where it is rendered. . . . It is beyond all doubt that the judgment of the Supreme Court of New York was conclusive

> upon the parties in that State. It must therefore be conclusive here also."

Replying also to the objection that the Act could not have the effect contended for, because it did not enable the courts of another State to issue executions directly on the original judgment, the Court said that that objection would apply equally to every other court of the same State where the judgment was rendered, and continued (p. 485):—

> "We can perceive no rational interpretation of the Act of Congress, unless it declares a judgment conclusive when a Court of the particular State where it is rendered would pronounce the same decision."

In *M'Elmoyle* v. *Cohen*, 13 Peters, 312, 326, the rule was stated in these terms: that the judgments of State courts "are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered."

See also

Crapo v. *Kelly*, 16 Wall. 610, 619.

The Court of Appeals, therefore, could not determine that the judicial proceedings in Massachusetts were a conclusive obstacle to the plaintiff without determining what their effect was in Massachusetts, and that that effect was to render *res adjudicata* the issue raised by the present case.

IV. THE DETERMINATION BY THE COURTS OF ONE STATE OF THE EFFECT TO BE GIVEN TO THE JUDICIAL PROCEEDINGS OF A SISTER STATE IS OPEN TO REVIEW BY THIS COURT UPON WRIT OF ERROR.

This Court has jurisdiction of a case presenting the question whether or not a judgment rendered in one State has received full faith and credit in the courts of another state.

Huntington v. *Attrill*, 146 U. S. 657.

And in particular when a State Supreme Court has decided against the effect which it was claimed proceedings in another State had by the law and usage of that State.

Green v. *Van Buskirk*, 7 Wall. 145.

See also

Andrews v. *Andrews*, 188 U. S. 28.
Crapo v. *Kelly*, 16 Wall. 621
Gt. West. Tel. Co. v. *Purdy*, 162 U. S. 335.
Huntington v. *Attrill*, 146 U. S. 684.
Harding v. *Harding*, 198 U. S. 325.

That in the present case the New York court has given too great effect to the Massachusetts proceedings, instead of too little, does not render its decision any the less reviewable by this Court.

Board of Pub. Works v. *Columbia College*, 17 Wall. 521, 529.
Wood v. *Watkinson*, 17 Conn. 500, 505.
Sugdam v. *Barber et al.*, 18 N. Y. 468, 472.
Warrington v. *Ball*, 90 Fed. 464.

V. THE COURT OF APPEALS FOR THE STATE OF NEW YORK ERRED IN DETERMINING THAT THE EFFECT OF THE JUDICIAL PROCEEDINGS IN THE PROBATE COURT OF MASSACHUSETTS WAS TO RENDER *RES ADJUDICATA* THE ISSUE RAISED BY THE COMPLAINANT IN THIS CASE.

(1) THE ISSUE IN THIS CASE IS ONE WHICH THE PROBATE COURT OF MASSACHUSETTS DID NOT AND COULD NOT PASS UPON BY ACTUAL DECREE, OR AFFECT BY THE LEGISLATIVE PART OF THAT DECREE.

The opinion of the Court of Appeals states, "The present action involved not only the question of fraud in the former judgment (that annulling the marriage), but the validity of the very marriage that that judgment nullified" (Rec., p. 60).

The plaintiff in her petition in the Massachusetts proceedings prays:—

> "*That the Court will make such order as it deems expedient concerning her support*" (Rec., p. 41).

The only thing, therefore, that the Court could actually determine in the Massachusetts proceedings was whether or not, *at that time*, the Court should order the defendant in error to contribute to the plaintiff's support.

The only "legislative" effect which the Court's decree could have was that the defendant should, or should not, so provide.

This is confirmed by an examination of the Massachusetts statute, under authority of which the Court was proceeding.

That provides:—

(Chap. 153, Sec. 33.)

> "When a husband fails without just cause to furnish suitable support for his wife, or has deserted her, or when the wife for justifiable causes is living apart from her husband, the probate court may by its order on the petition of the wife, or if she is insane on the petition of her guardian or next friend, prohibit the husband from imposing any restraint on her personal liberty for such time as the court shall in its order direct, or until the further order of the court thereof; and the court may upon the application of the husband or wife or of her guardian make such further order as it deems expedient concerning the support of the wife and the care, custody and maintenance of the minor children of the parties, and may determine with which, or either, parents the children or any of them shall remain; and may from time to time afterwards, on a similar application, revise and alter such order, or make a new order or decree as the circumstances of the parents or the benefit of the children may require."

The Probate Court, then, was not asked by the petitioner, nor indeed did it have authority, to pass upon, in its *decree* or judgment, the "question of fraud in the former judgment or the validity of the very marriage that judgment nullified."

It is clear, then, that the matters to be determined by the actual legislative portions of the decree were *different* in the two proceedings. But it is argued that in both proceedings the question of the validity of the plaintiff's marriage to the defendant was involved.

This is not the case.

In the present action it was involved as an issue which the decree in its legislative part must directly deal with, and the command of the decree must be that the marriage was or was not valid.

In the Massachusetts proceedings the validity or existence

of the marriage was not, as we have shown, a matter which was within the power of the Court to determine by the authoritative portion of its decree.

Moreover, the only issue which even related to the validity of the marriage of the parties was the existence of the New York decree, and the jurisdiction of the court rendering it. By the very principle of *res adjudicata* which the defendant now invokes, the Massachusetts Court was precluded from considering the issue in this case: namely, the *validity* of that New York decree, and that of the marriage here in issue.

The plaintiff, then, is not precluded by the actual decree in Massachusetts.

Even between the same parties an incidental fact, upon the determination of which a former decree is claimed to be founded, is not conclusively established unless it was in issue in the former proceedings in a way fundamentally different from the way that the fact here alleged to be adjudicated was in issue.

(2) THE ISSUE IN THIS CASE WAS NOT RENDERED *res adjudicata* BY THE JUDICIAL PROCEEDINGS IN MASSACHUSETTS.

(a) *It was not a fact which was, or could have been, litigated or decided in Massachusetts.*

The effect to be given in New York to the judicial proceedings in Massachusetts depended, as we have shown in a former portion of the brief, on the effect those proceedings would have in the State where rendered. That effect, then, is a question of Massachusetts law, to be determined by the New York court, and by this Court, upon the evidence of the Massachusetts law before the Court. Where that is not conclusive, what the Massachusetts law is will be determined by the presumption that it is the same as the New York law,

which is to be determined by New York decisions and the general law applicable. As illustrations of that general law, Massachusetts decisions, even if not in evidence, are persuasive.

That the issue in the present case,—namely, the validity of the New York decree and of the marriage it annulled,—was not, and could not have been, litigated or decided in the Massachusetts proceedings, seems clear.

The copy of the New York judgment annulling the marriage was before the Court (Rec., pp. 45, 26).

That decree annulled the marriage between the plaintiff and defendant.

That decree could not be collaterally attacked, and by virtue of the Constitution of the United States the validity and effect of that decree could not be questioned, in Massachusetts.

There was no course open, then, for the Massachusetts Court, but to assume the non-existence of the marriage of the parties, established by that decree. For the plaintiff to try the issue of this case, the validity of that decree, was impossible. For the Massachusetts judge to decide it was impossible. Accordingly, the plaintiff's petition was dismissed (Rec., p. 44), but only until the decree of annulment should be set aside in New York (Rec., p. 45).

The very principle here invoked by the defendant rendered it impossible that the Massachusetts Court should decide the question the defendant now claims that it did decide.

(See *Kerr* v. *Kerr*, 41 N. Y. 272; Rec., p. 61).

We know of no authority which has decided or intimated that a matter not open to contravention or decision in one action between the parties is by the decree in that action rendered *res adjudicata* in another action between them.

On the contrary, the general rule of Massachusetts, New York, and of other jurisdictions, is clear, that matters which could not have been litigated in an action are not rendered *res adjudicata* by the judgment in such action.

(b) *The issue of this case was not a matter necessary to be determined by the Massachusetts Probate Court in the action taken by it.*

The plaintiff, in her petition, alleged various essential grounds for the relief sought (Rec., p. 41).

1. That her husband failed to support her;
2. That her husband failed to support her without just cause;
3. That her husband failed to support her suitably;
4. That her husband has deserted her;
5. That she is living apart from her husband for justifiable cause.

The petition was simply dismissed. The ground for dismissal may have been any one or any number of the five above grounds. There is nothing in the record to show that the Massachusetts Court did not reach its result on some ground other than that which, it is contended, that result renders *res adjudicata*.

Under such circumstances it cannot be held, upon the face of the record, that there was identity of issues and resulting *res adjudicata*.

Umlauf v. *Umlauf*, 117 Ill. 584.
See *Harding* v. *Harding*, 198 U. S. 337, 338.

It is clearly the law of Massachusetts, of New York, and the general law that, when a general result may have been reached

by the determination of any undeterminate one of several facts, no particular fact is conclusively determined.

Stannard v. *Hubbell*, 123 N. Y. 520.
House v. *Lockwood*, 137 N. Y. 259.
Stokes v. *Foote*, 172 N. Y. 327, 342.
Burlen v. *Shannon*, 99 Mass. 200.
Lea v. *Lea*, 99 Mass. 493.
Foye v. *Patch*, 132 Mass. 105, 111.
Stone v. *Addy*, 168 Mass. 26.

(c) *The issue of this case was not in fact a matter determined by the Massachusetts Probate Court.*

Even if, upon the face of the record, it could be found that the issue of this case was determined by the Massachusetts Court, which we submit we have shown above it cannot, the record being silent thereon, it became at best a question of fact *dehors* the record.

The burden of proof was upon the husband, for it is the defendant who sets up the estoppel.

Vaughn v. *O'Brien*, 57 Barb. 491, 495.
Foye v. *Patch*, 132 Mass. 105, 111.
Cromwell v. *Sack*, 94 U. S. 351.

This burden the defendant has not only not met, but the record shows that the Probate Court did not pass upon the validity of the marriage.

In the *first* place, it could not, as we have shown above.

Secondly, it did not, leaving the matter open till the result of the direct attack upon the New York judgment was determined (Rec., p. 45).

Thirdly, it affirmatively appears that the Probate Court did not negative the validity of the marriage of the parties, for the decree itself recites that,

> "on the petition of Georgia L. Everett of Boston, *the wife* of Edward Everett of said Boston," etc. (Rec., p. 44).

These very recitals are in New York *prima facie* evidence of the fact—*i.e.*, that she was wife—recited.

Steinam v. *Strauss*, 18 N. Y. Suppl. 48, 137 N. Y. 561.

Fourthly, in the pleadings in this case the wife denied the same issues were in fact involved in the Massachusetts decision after the husband had entered the plea of former adjudication (Rec., pp. 14, 18).

An issue of fact was raised, extrinsic evidence was taken.

The Supreme Court found as a fact that the matters set forth in the husband's plea as to former adjudication "were not *res adjudicata* as to the issues herein" (Rec., p. 20, eighth finding of fact).

And that finding of fact was affirmed by the *unanimous* judgment of the Appellate Division (Rec., pp. 48–49), and was binding on the Court of Appeals, whose jurisdiction is limited to a review of questions of law.

> "The jurisdiction of the court [of Appeals] is limited to a review of questions of law."
>
> N. Y. Code of Civil Procedure, Sec. 191, Par. 3.

> "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact, or a verdict not directed by the court, shall be reviewed by the court of appeals."
>
> N. Y. Code of Civil Procedure, Sec. 191, Par. 4.

(d) *The issue in this case was not rendered* res adjudicata *because the alleged decree in Massachusetts did not import a decree on the merits.*

The entry in the Massachusetts Probate Court, "Petition Dismissed" (Rec., p. 44), does not necessarily import a decree on the merits. And a consideration of the extrinsic

evidence shows that there was a voluntary dismissal on the part of the wife (Rec., pp. 45–47) at a time when she had a perfect right to dismiss her petition, which dismissal was acquiesced in by the husband and permitted by the Court. The mere fact that the Court did not see fit to grant her request that the decree should contain the customary technical words "without prejudice" (Rec., pp. 45–47) is not conclusive upon her rights.

Lanphier v. *Desmond*, 187 Ill. 382.
Haldeman v. *United States*, 91 U. S. 584.

And, since the decree purported only to deny to the wife affirmative relief (Rec., pp. 41, 44), it did not bar a new application on her part for separate maintenance.

Buckman v. *Phelps*, 6 Mass. 448.
Pettee v. *Wilmarth*, 5 Allen, 144–146.

For the Court of Appeals to hold the contrary (Rec., pp. 53–61) was to deny to the Massachusetts decree the effect which the wife claimed it had by law and usage in Massachusetts.

(e) *The issue in the present case arises on a different state of facts from the facts upon which the Massachusetts proceedings were predicated.*

The issue in the original proceedings in New York was the validity of the original marriage. An issue in the Massachusetts proceedings was the existence of the New York decree. The issue in this case is whether or not the New York decree was obtained by fraud and the validity of the marriage annulled.

In the Massachusetts proceedings the validity of the original marriage and the invalidity of the New York decree could not be shown, because of the New York decree being

conclusive by virtue of the Constitution, and because no proceeding had been instituted to set it aside.

In the present proceedings the bar operative in the Massachusetts proceedings—namely, the unimpeached New York decree—is not here operative.

The situation upon which the present action is predicated is, therefore, different, and it is well settled that a former judgment is not binding when the circumstances upon which a new action is predicated have changed.

VI. CONCLUSION.

For the foregoing reasons, therefore, we submit that the judgment of the Court of Appeals should be reversed and held erroneous.

When the Massachusetts Court was precluded, by virtue of the Constitution, from determining an issue, for the Constitution then to be invoked as a means of establishing that the Massachusetts Court had rendered *res adjudicata* the very matter it could not adjudicate would call for an interpretation of the Constitution unfounded in principle or reason.

FRANK H. STEWART,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
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OCT 16 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 1.

GEORGIA L. EVERETT,

Plaintiff in Error,

against

EDWARD EVERETT.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE ZABRISKIE,
Of Counsel.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

GEORGIA L. EVERETT,
Plaintiff-in-Error,

AGAINST

EDWARD EVERETT.

October Term,
1909, No. 1.

BRIEF FOR DEFENDANT-IN-ERROR.

This is a writ of error to the Supreme Court of the State of New York to review a judgment entered March 6, 1905, upon remittitur from the Court of Appeals, which reversed a judgment of the Appellate Division of the Supreme Court for the Second Department, affirming a judgment of the Supreme Court at Special Term, and dismissed the complaint on the merits (*Judgment on Remittitur*, p. 5).

Statement.

The action was commenced in the Supreme Court of the State of New York, in Kings County, April 1, 1897, by the plaintiff in error against the defendant in error. In her amended complaint, the plaintiff prayed that a judgment of the same Court, rendered April 9, 1888, at the suit of the defendant against the plaintiff, annulling a marriage between them, be annulled, vacated and set aside, and that the marriage be declared to be binding and in full force and effect between the parties (p. 4).

In substance, the plaintiff states in her complaint that she is a resident of Brooklyn, and was married to the defendant October 30, 1884, at Brooklyn by John

Courtney, a justice of the peace, and that they lived together as husband and wife from that time until June 1, 1891. She charges that in or about the year 1887, with fraudulent intent and for the purpose of misleading and deceiving her, the defendant represented to her that his family would never recognize a marriage by a justice of the peace, referring to the Courtney marriage, and that a ceremonial marriage would have to take place before a minister of the Gospel; that it would be necessary to have the marriage ceremony performed by the justice of the peace annulled and set aside, and that after that had been done he would have a ceremonial marriage performed by a regularly ordained minister of the Gospel; that the proceedings to annul the Courtney marriage would be merely formal in character; that the plaintiff need not give the same any attention whatever, and that he would look after all of the details; that it would not be necessary for her to peruse any papers which might be served on her, nor to engage the services of counsel to represent her in such proceedings. She states that proceedings were instituted December 17, 1887, in the Supreme Court of the State of New York, in Kings County, the purpose and object of which were to have the marriage contract between herself and the defendant declared void, and the marriage between them annulled; and that relying solely upon the statements and representations so made by the defendant, and believing them to be true, she did not employ counsel to represent her in such proceedings, and paid no attention whatever thereto. She alleges that she had, and has now, a good and substantial defense on the merits to the cause of action set forth in the complaint in that action; and in stating what it is she says, in substance, that when she was about 16 years of age, she went with William G. Morrison to a social gathering, and at Providence, Rhode Island, in a spirit of fun, she stood up with Morrison, and one of the parties present went through a sham ceremony

of marriage; that whatever was done by her and Morrison they did in the spirit of fun and without the intention of becoming married; that the person who performed such ceremeny had no authority under the laws of Rhode Island to perform it; that she was a minor under the age of 16; that within a hour after the ceremony was performed she returned to her home in Boston, and nothing further was heard of the alleged marriage until two months afterwards, when Morrison claimed that the marriage was valid, and she went to live with him in Boston and lived with him six months, but left him before she reached the age of 17; that no consent of her parents or guardians to the so-called marriage had been obtained, no license had been procured as required by law, and no record of the marriage was made in the office of the county clerk of the county where the ceremony took place; that the marriage between her and Morrison was not recognized by the laws of Rhode Island and was null and void. She says that the defendant took steps to ascertain whether there had been a lawful marriage between her and Morrison, and that all the facts were known to him on the 17th of December, 1887, and he became satisfied that no valid marriage had taken place between her and Morrison. The complaint further states that such proceedings were had in the nullity suit as resulted in the present defendant obtaining a judgment, entered in the office of the Clerk of Kings County, April 9, 1888, declaring the marriage contract between him and the plaintiff void and annulling the marriage. The plaintiff goes on to allege that immediately upon being advised that the marriage had been annulled, she demanded of the defendant that a ceremonial marriage be at once performed by a minister of the Gospel, as he had promised to do; but that no ceremonial marriage was ever performed, although they lived together down to June 1, 1891, and during that entire period he repeated and reiterated his promise to have the same performed. The complaint closes with a general charge of fraud and deceit

against the defendant in procuring the judgment annulling the marriage. The prayer for judgment is, first, that the judgment or decree of April 9, 1888, be annulled, and in all respects vacated and set aside; second, that it be further adjudged and decreed that the marriage contract between the plaintiff and the defendant is still binding, and the marriage between them still in full force and effect; third, for costs; and, fourth, for general relief.

Following the complaint is a statement in the nature of a bill of particulars (p. 5).

The defendant, in his amended answer (pp. 7–15), admits the Courtney marriage, but denies that the parties ever lived together as husband and wife, or otherwise. He denies particularly the representations alleged in the complaint, and the charges of fraud. He denies that the plaintiff, after the marriage had been annulled, demanded that a ceremonial or other marriage be performed by a minister of the Gospel, or otherwise, and denies that during the period of three years referred to in the complaint he promised to have a ceremonial or other marriage performed. He admits the institution by him of the action in the Supreme Court of New York, for the purpose of annulling the Courtney marriage, resulting in the judgment of nullity entered on or about April 9, 1888. He denies that the defendant had a good and substantial defense on the merits to that action, and denies that he took steps to ascertain whether the marriage between the plaintiff and Morrison was valid, or that he became satisfied that no marriage had ever taken place between them; and he says further that he never heard prior to his marriage with the plaintiff that she had ever been married to Morrison.

Besides answering the charges contained in the complaint, the defendant pleads five other defenses. In the second defense, paragraph 5, the defendant pleads the decree of April, 1888, in connection with the denial of the alleged fraud. The third, paragraph 6, pleads an order made by the General Term of the Supreme

Court in the same action in which the decree of April, 1888, was entered, denying plaintiff's motion to open the judgment and let her in to defend. The fourth, paragraph 7, pleads plaintiff's negligence, laches and acquiescence.

The fifth separate defense, paragraph 8, is a plea of *res adjudicata*, based upon a decree of the Probate Court for the County of Suffolk, Massachusetts, dismissing a proceeding brought by the plaintiff against this defendant for maintenance upon the ground that she was the lawful wife of the defendant, and that he failed without just cause to furnish suitable support for her and had deserted her, and that she was living apart from him for justifiable cause. That proceeding was commenced February 21, 1895. Pursuant to an order of the Court made April 1, 1895, the plaintiff filed specifications wherein she specified two marriages between herself and the defendant, first, the Courtney marriage in Brooklyn, October 31, 1884; and second, a marriage April 15, 1888, by mutual consent and consummation, followed by acknowledgment and cohabitation in New York and in Massachusetts from April 15, 1888, to May 31, 1891, at which time she alleges that the defendant deserted her. The defendant answered the petition in the Probate Court, and admitting the Courtney marriage alleged that it had been duly adjudged to be null and void by the Supreme Court of New York by its judgment rendered April 4, 1888, in the nullity suit before mentioned. In respect to the other marriage, alleged to have taken place April 15, 1888, the defendant stated that at that time, and at the time of the Courtney marriage, and at all other times subsequent to, as well as long before, the Courtney marriage, the plaintiff was the wife of William G. Morrison, and by reason thereof the supposed marriages between this defendant and the said plaintiff by her alleged, were, and each of them was, null and void.

Such proceedings were duly had in the cause that it was heard by the Probate Court upon the issues raised

by the defendant's answer to the plaintiff's petition, and the Court thereupon found the said issues for the defendant, and made its decree, March 25, 1897, whereby the Court found and decided that the plaintiff's petition should not be granted, and adjudged that the petition be dismissed.

Finally, in paragraph 9 of his amended answer, the defendant pleads adequate remedy at law (p. 15).

The plaintiff replied to the defendant's amended answer reiterating, in substance, the allegations of the complaint (pp. 16–19).

This cause was tried before a justice of the Court in Kings County, in January, 1903, and resulted in a judgment entered, according to the New York practice (*Code of Civil Procedure*, § 1022), upon a decision containing findings of fact and conclusions of law (pp. 19–21). Among other things the Court found as a fact: "VI. That the defendant herein, intending to mislead this plaintiff, made to this plaintiff false and fraudulent representations, knowing them to be false, concerning the nature, the effect and object of the said action, for the purpose of inducing this plaintiff to abstain from defending the said action, and that the plaintiff, believing the said false and fraudulent representations to be true, did abstain from defending the said action."

The Court further found under the head of facts: "VIII. That the matters set forth under the second, third and fifth defenses, or either of them, in the answer herein, are not *res adjudicata* as to the issues herein."

The judgment decreed: "That the judgment or decree of this Court annulling the marriage between the plaintiff and the defendant herein, which judgment bears date the 9th day of April, 1888, be, and the same is in all respects vacated, annulled and set aside; and it is further ordered, adjudged and decreed that the marriage contract heretofore made between the plaintiff and the defendant is still binding and that the marriage between this plaintiff and the defendant is still in full force and effect" (pp. 22–3).

The defendant appealed from this judgment to the Appellate Division of the Supreme Court, where the judgment was affirmed, and judgment entered accordingly (pp. 48, 50).

From the judgment of affirmance the defendant appealed to the Court of Appeals, and there the judgment of the Appellate Division was reversed and the cause was remanded to the Supreme Court with instructions to dismiss the complaint upon the merits (pp. 51-2). Judgment was accordingly entered in the Supreme Court March 6, 1905, upon the remittitur of the record from the Court of Appeals, dismissing the complaint upon the merits (p. 63).

The Court of Appeals, in their opinion (p. 55), place their judgment upon two grounds. In the first place they hold that the judgment of the Probate Court for Suffolk County, Massachusetts, is a bar to this action. The Court said: "We think that that judgment was conclusive upon the parties to this action with respect to all the questions which were involved in the proceeding and decided by the Court, and clearly one of those questions was the status of the present plaintiff. She alleged that she was the defendant's wife, and this allegation must be deemed to have been negatived by the decision in the proceeding" (p. 58).

In the second place they hold that the finding of fraud in the decision of the trial Court is not a finding of fact, but is merely a conclusion of law, and that it is not supported by any facts found by the Court. They say: "The question of actual fraud on the part of the defendant occupies an important place in the controversy. Much evidence was given at the trial on that question. The allegations of the complaint are full and specific as to the fraud which it is claimed the defendant perpetrated upon the plaintiff." The allegations of the complaint are recapitulated, and the Court proceeds: "None of the facts so alleged were found by the learned trial court, and the findings in this case are entirely silent as to what, if anything, the defendant did or said that induced the plaintiff to

forbear defending the action. The finding is in these words : [in language already quoted, *supra*]. Although this finding seems to be quite sweeping and comprehensive in its language, it does not contain a single specific fact which justified the conclusion that the defendant had been guilty of fraud in procuring the judgment. It is nothing more than a mere conclusion, without any facts to sustain it. The plaintiff sought to impeach a judgment recovered against her many years before. In such an action we think it is not sufficient to find fraud in general terms without specifying a single act or a single statement upon which such a conclusion could be predicated. In an action where fraudulent acts and statements are charged the general conclusion of law that the defendant was guilty of fraud is not sufficient to support the judgment " (pp. 60, 61).

FIRST.

The Scope of the Action.

I. The plaintiff seeks to establish the validity of the Courtney marriage, celebrated by a justice of the peace of that name between the plaintiff and the defendant at Brooklyn, October 30, 1884. To that end it was necessary to get rid of the judgment of the Supreme Court of New York rendered April 9, 1888, declaring that marriage null. In order to get rid of that judgment the plaintiff charged that it was obtained by fraud of the defendant through which she was prevented from defending the suit, and that she had a good defense which she could have established.

II. The suit falls under the category termed in treatises on equity and in the authorities, Bills to Impeach a Decree for Fraud. Such suits are so described, not because the end and final result of the

decree is merely to establish that the decree challenged was fraudulently obtained, but because the characteristic mark of a suit of this character is to remove the bar of a final decree which is *res adjudicata* upon the issues raised by the complainant, and so long as it stands unreversed precludes him from obtaining the relief which he seeks. The ultimate relief given to the successful complainant will be as various as the rights and equities established may warrant, and therefore affords no characteristic names for this class of suit.

Story's Equity Pl. §§ 426,428.
Mitford & Tyler's Equity, Pl., 129, 130; 190, 191.

In the equity jurisprudence of the State of New York it is the practice of the court in cases where the impeached judgment is found to have been obtained fraudulently, to proceed to grant the relief which the circumstances warrant.

Whittlesey vs. Delaney, 73 N. Y., 571.
Warren vs. Union Bank of Rochester, 157 N. Y., 259, 276.

III. In a suit of this character it is necessary in New York, as well as in the federal courts, and elsewhere to allege and prove two distinct things: first, that the party complaining had a good defense on the merits to the claim upon which the judgment impeached was rendered; and second that he was prevented from availing himself of that defense by the fraud of the other party.

2 Story, Equity § 885 *(a)*.
Blank vs. Blank, 107 N. Y., 91.
Whittlesey vs. Delaney, 73 N. Y., 571.
Kimberly vs. Arms, 40 Fed. Rep., 548.
White vs. Crow, 110 U. S., 183.
Ableman vs. Roth, 12 Wis., 81.
Dobbs vs. St. Joseph Fire Ins. Co., 72 Mo., 189.
Williams vs. Nolan, 58 Tex., 708.

IV. Recognizing these principles, the plaintiff in her amended complaint has stated that she had a good defense to the defendant's suit to annul the marriage between them, which, in short, was that she was not the wife of William G. Morrison, as he charged, when she was married by Courtney to the defendant, and therefore she became by that marriage the lawful wife of the defendant ; and she charges that the defendant, by means of specified false and fraudulent acts and representations induced her to refrain from availing herself of that defense.

Thus she tendered two issues, which were accepted by the defendant : the issue of her status as wife of the defendant, and the issue of defendant's fraud. If she fail to establish either one she must fail in her action.

V. The Court of Appeals held that she had failed on both issues.

With regard to the issue of status, they held the decree of the Probate Court in Massachusetts an adjudication that she was not the defendant's wife. With regard to the issue of fraud, they held that she had not proved the fraud which she charged. They therefore directed, on both grounds, that her complaint be dismissed ; and the Supreme Court accordingly dismissed it.

SECOND.

The judgment of the Court of Appeals proceeded upon two grounds, of which at least one presents no federal question.

I. Whatever may be thought of the bearing of the faith and credit clause of the Constitution upon the effect given by the Court of Appeals to the decree of the Probate Court in Massachusetts, the judgment of

the Court of Appeals rests quite as much upon their determination of the issue of fraud, which involves no federal question.

II. In such a case this Court will not assume jurisdiction.

Allen vs. Arguimbau, 198 U. S., 149.
Dibble vs. Bellingham Bay Land Co., 163 U. S., 63.
Johnson vs. Risk, 137 U. S., 300.
Klinger vs. Missouri, 13 Wall., 257.

THIRD.

No federal question is involved in the case.

I. The only federal question suggested by the plaintiff in error is asserted to arise under Article IV., Section 1 of the Constitution, ordaining that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

With regard to the effect of the judicial proceedings and records of a State when they come in question in another State, Congress has prescribed the manner in which they shall be proved, and has enacted that "the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken" (U. S. Revised Statutes, § 905).

II. Upon a question arising under these provisions of the Constitution and the statutes of the United

States, the jurisdiction of this Court is limited to those cases where [3] " any title, right, privilege or immunity is claimed under the Constitution, or under any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority " (U. S. Revised Statutes, § 709).

III. The party who claimed the right under the decree of the Probate Court was the defendant; and the decision was not against, but in favor of, the right so claimed; and under that decision neither party has the right to have the cause re-examined here.

IV. No claim of any right, privilege or immunity in respect to the decree was specially set up or claimed by the plaintiff. The only allusion to it on her part in the pleadings or elsewhere in the record is found in her reply to defendant's amended answer, in which she says that " the issues in this action were in no wise considered in said action * * * and said judgment of said Probate Court [for] the County of Suffolk, Commonwealth of Massachusetts, entered on or about the twenty-fifth day of March, 1897, did not determine the questions at issue in the present proceedings, and was entered with leave to renew the said proceedings as hereinbefore set forth " (pp. 18, 19).

These allegations merely touch the construction of the decree: what it determined; and they present—improperly, to be sure, as matter of pleading—the question whether it determined the issues involved in this action. The plaintiff does not appear to have denied that if the issues in this action or any of them were determined in the Probate Court the decree of the Probate Court would be conclusive here.

In this situation two principles, well established in this Court, preclude the successful assertion here on

the part of the plaintiff of any right based upon the decree of the Probate Court.

1. A right, privilege or immunity claimed under the Constitution must, under clause 3 of § 709 of the Revised Statutes of the United States, be claimed in the court below by the party seeking the advantage of it.

Johnson vs. N. Y. Life Ins. Co., 187 U. S., 491, 495.
Eastern Building & Loan Ass'n vs. Williamson, 189 U. S., 122.
Glenn vs. Garth, 147 U. S., 360.
Lloyd vs. Matthews, 155 U. S., 222.

2. Where the plaintiff in error claims merely that the state court erroneously construed the judgment of a court of another state, without denying that the state court gave to the judgment the effect which such construction warrants, there is no question of faith and credit involved which this Court has jurisdiction to review.

Allen vs. Alleghany Company, 196 U. S., 458.
Finney vs. Guy, 189 U. S., 335.
Johnson vs. N. Y. Life Ins. Co., 187 U. S., 491.
Banholzer vs. N. Y. Life Ins. Co., 178 U. S., 402.
Lloyd vs. Matthews, 155 U. S., 222.
Glenn vs. Garth, 147 U. S., 360.

THIRD.

If upon any ground this Court have jurisdiction, the judgment of the State Court upon the plea of *res adjudicata* is right.

1. The question in the State Court arose in substance upon the sufficiency in law of the plea, as stated

in the amended answer (p. 14). In that plea the proceedings in the Probate Court are detailed. The allegations of plaintiff's petition, and the issues raised by the defendant's answer, are stated. The defendant admitted that he had been married to the plaintiff October 30, 1884, in Brooklyn, by JOHN COURTNEY, Justice of the Peace, and alleged that the marriage had been duly adjudged to be null and void by the Supreme Court of New York by its judgment rendered April 8, 1888, in the suit brought by him against this plaintiff for that purpose. He did not deny the charge of abandonment and non-support. In respect to the marriage alleged in the plaintiff's specifications filed in the Probate Court to have taken place on or about April 15, 1888, the defendant answered that both then and at the time of the Courtney marriage, October 30, 1884, and at all other times subsequent to, as well as long before October 30, 1884, the plaintiff was the wife of William G. Morrison, and by reason thereof the supposed marriages alleged by the plaintiff to have taken place between her and the defendant were and each of them was null and void. The plea further states that such proceedings were had in the Probate Court upon the issues raised by the defendant's answer to plaintiff's petition that the Court found the said issues for the defendant, and thereupon made its decree March 25, 1897, whereby the Court found and decided that the prayer of the petition should not be granted, and adjudged that the petition be dismissed.

The trial Court disposed of this plea by holding "that the matters set forth under the * * * fifth defense * * * in the answer herein, are not *res adjudicata* as to the issues herein" (p. 20).

Although this finding was styled a finding of fact the Court of Appeals held it to be a conclusion of law and said: "It expresses the decision of the trial Court on a matter of law and not upon a matter of fact. It is substantially the decision of the Court that these defenses are not available to the defendant herein. The question presented on this ruling is sub-

stantially the same as if the plaintiff had demurred to these several separate defenses on the ground that in law they constitute no defense to the action. This finding was excepted to by the defendant and this exception presents the question whether the disposition made by the learned trial Court of these several defenses was correct " (p. 57).

II. The point decided by the Probate Court, as appears from the averments of the defendant's answer herein, is that the plaintiff is not the defendant's wife : first, because the Courtney marriage was dissolved by the decree of the Supreme Court of New York rendered April 4, 1888 ; and, second, because both the Courtney marriage and the other non-ceremonial marriage claimed by the plaintiff to have taken place April 15, 1888, were void, because at both of those times, and at all other times subsequent to, as well as long before, October 30, 1884, plaintiff was the wife of William G. Morrison.

In the case at bar, while both parties agreed that the Courtney marriage had been dissolved by the decree of the Supreme Court of New York, the plaintiff charged, and the defendant denied, that the decree was vitiated by fraud ; and the defendant claimed, and the plaintiff denied, that the Courtney marriage was null and void *ab initio*, for the reason that the plaintiff was the wife of William G. Morrison, and consequently she had no defense on the merits of the nullity suit.

Thus, the matter in controversy in this action with regard to the validity of the Courtney marriage is the same matter which was in controversy between the same parties in the Probate Court.

III. The averments of the answer show that the Probate Court had jurisdiction of the subject matter of the suit and of the parties.

Although the trial Court expressed its decision overruling this defense in such terms as presupposed that the averments of the answer are true, but the facts

pleaded do not amount in law to a good plea of *res adjudicata*, the record contains some of the evidence in support of the facts, and particularly with regard to the jurisdiction of the Probate Court and the finality of its decree.

1. On the question of jurisdiction, the evidence includes an extract from the Constitution of Massachusetts empowering the General Court to erect and constitute judicatories and courts of record or other courts (p. 38), and extracts from the Public Statutes of Massachusetts creating probate courts of the several counties and constituting them courts of record; and in particular conferring upon the probate courts jurisdiction to entertain proceedings on the part of a wife, when her husband fails without just cause to furnish suitable support for her, or has deserted her, or when the wife, for justifiable cause, is actually living apart from her husband; and empowering the court to make order concerning the support of the wife (p. 39).

Among other witnesses, the counsel for the present defendant in the Probate Court and the register of that Court were examined and agreed that the Probate Court had jurisdiction to entertain the proceeding. Mr. Shaw (p. 28) testifies: "That court has exclusive jurisdiction in proceedings of this kind. They can only be brought in that court, to the best of my knowledge." He further says "An appeal would have lain from this decree of the Probate Court to some higher court, to the Supreme Court, and, I believe, the Superior Court now by statute. No appeal was taken from the decree" (p. 30). The register of the Court, Mr. Elijah George said: "The Probate Court is the court which at this time had sole jurisdiction to grant separate maintenance to a wife; that is, jurisdiction in such a case as this, except on appeal of course. It had the original jurisdiction" (p. 37).

This evidence was not contradicted.

2. On the question of finality the evidence shows that the decree of the Probate Court was a final decree.

(a) It appears on its face to be final. It runs, after the preliminary recitals, in these terms: "It appearing to the Court, after hearing thereon, that the prayer of said petition should not be granted, it is Ordered that said petition be dismissed" (p. 44). It disposes of the issues in the cause; it leaves nothing more to be determined; and it dismisses the parties out of Court.

(b) The testimony of the witnesses is to the same effect. Mr. Shaw says: "According to the practice of the Probate Court I should say it imports a final determination upon the merits on the issues involved in the suit" (p. 27). Mr. Read, one of defendant's counsel, says: "The language of the decree which forms part of the exemplified copy of the record in the suit in the Probate Court, which is marked No. 2 for identification, according to the course and practice of the court and the customary form of decrees, imports a final decree determining the issues in that cause" (p. 33). Mr. Hunt, plaintiff's counsel, says: "The form of a decree dismissing such a petition upon the merits would be simply 'Petition dismissed' usually; that is all that would be said in the decree" (p. 46); and again: "This decree was final as far as it went; as I understand it put an end to that proceeding" (p. 47). Mr. George, the register, says: "The language of the decree part of the decree, according to the course and practice of that Court, imports a final decree, a final disposition of the merits; it is a decree upon the merits in the usual form" (p. 37).

III. A final decree of a Court of competent jurisdiction, upon the merits of the cause, is conclusive between the parties upon the material matters thereby necessarily determined.

Embury vs. Connor, 3 N. Y., 511, 552.
Dobson vs. Pearce, 12 N. Y., 156.
Prey vs. Hegeman, 98 N. Y., 351.
Griffin vs. Long Island R. R. Co., 102 N. Y., 449.

IV. Such being the ordinary rule of law there is no evidence in the record to indicate that in Massachusetts the decree of the Probate Court would be accorded any other or different faith or credit.

1. In ascertaining what credit is given to judicial proceedings in the State where they took place, this Court is limited to the evidence on that subject before the Court whose judgment is under review.

Tilt vs. Kelsey, 207 U. S., 43, 57.

2. The conclusiveness of the decree is not impaired by the fact that the cause of action in the suit in which the judgment was rendered is different from the cause of action in the suit at bar.

Doty vs. Brown, 4 N. Y., 71.
Lythgoe vs. Lythgoe, 75 Hun, 147; 145 N. Y., 641.

In such instances the judgment is conclusive as to those matters in issue upon the determination of which the finding or verdict was actually rendered.

Cromwell vs. County of Sac, 94 U. S., 351, 352-3.
Southern Pacific Railroad Co. vs. United States, 168 U. S., 1; 48, 49.
Bell vs. Merrifield, 109 N. Y., 202, 211.

3. The conclusiveness of the decree is not impaired by the fact that it was rendered by an inferior Court of limited jurisdiction.

In this instance the Probate Court is shown to be a Court of record (p. 39). It had jurisdiction of the parties; and as to the subject matter, its jurisdiction was exclusive of all other Courts (pp. 39, 37).

Caujolle vs. Ferrié, 13 Wall., 465.
Smith vs. Hemstreet, 54 N. Y., 644.
Hallock vs. Dominy, 69 N. Y., 238.

4. The form of the proceeding does not affect the conclusiveness of the decree. The efficacy of the

judicial determination attaches no less to summary, special or statutory proceedings, than to actions.

Culross vs. Gibbons, 130 N. Y., 447.
Reich vs. Cochran, 151 N. Y., 122.
Smith vs. Zalinski, 94 N. Y., 519.
Matter of Livingston, 34 N. Y., 555.

5. It is no objection to the conclusiveness of the decree though, as suggested, the evidence presented on the hearing in support of the defendant's plea that he was not the petitioner's husband consisted of the judgment record in the Nullity suit, which in this action the plaintiff impeaches for fraud.

The sufficiency of the proof upon which the Court acted is not open to consideration where the judgment is pleaded as a bar or is relied on as evidence; otherwise the judgment would not be conclusive, and there could be no such thing as *res adjudicata*.

Crescent Live Stock Co. vs. Butchers Union, 120 U. S., 141; 159, 160.
Deposit Bank vs. Frankfort, 191 U. S., 499; 510–512.
Grignon's Lessee vs. Astor, 2 How., 319, 339.
Comstock vs. Crawford, 3 Wall., 396, 406.

FOURTH.

The writ of error should be dismissed, but if it be retained the judgment should be affirmed.

GEORGE ZABRISKIE,
Of Counsel for Defendant in Error.

testimony, in the absence of a bill of exceptions, that the decree may have rested on any of the other defenses asserted by the husband.
180 N. Y. 452, affirmed.

THIS is a writ of error to review a judgment of the Supreme Court of New York upon the ground that the final order of that court, entered pursuant to the mandate of the Court of Appeals of New York in this case, failed to give full faith and credit to the judicial proceedings in a certain action determined in the Probate Court of Suffolk County, Massachusetts.

The facts out of which this question arose may be thus summarized:

The present plaintiff in error, Georgia L. Everett, on or about April 1st, 1897, brought this action in the Supreme Court of Kings County, New York, against the defendant in error, Edward Everett, alleging that she and the defendant were lawfully intermarried in that county before a Justice of the Peace, on the thirtieth day of October, 1884; that under the false pretense that that marriage would never be recognized by his family, and that a ceremonial marriage would have to take place before a Minister of the Gospel, the defendant, on or about December 17th, 1887, fraudulently instituted an action in the same court to have the above marriage annulled; that the plaintiff had a valid defense to such action, but in consequence of fraudulent representations to her by the defendant she made no defense therein, by reason whereof a decree was rendered on or about April 9th, 1888, declaring that the alleged marriage between her and the defendant was null and void; and that they had lived and cohabited together as husband and wife from the date of said marriage down to and including June 1st, 1891.

The specific relief asked in this case, brought in 1897, was a judgment that the decree of April 9th, 1888, in the case brought in 1887, be vacated and set aside, and that it be adjudged that the marriage between the plaintiff and the defendant was binding and in full force and effect.

The defendant, by answer, controverted all the material

facts alleged in this case relating to the obtaining of the above decree of April 9th, 1888. He set forth various grounds of defense, but none of them raised any question of a Federal nature. He made, however, a separate, special defense herein based upon the record of certain proceedings in the Probate Court of Suffolk County, Massachusetts.

The allegations of the answer as to those proceedings were substantially these: That on or about February 21st, 1895, the present plaintiff, Georgia L. Everett, brought an action against him in the Probate Court of Suffolk County Massachusetts, claiming to be, as was the defendant, a resident of Boston, and also claiming to be his lawful wife; that he had failed, without just cause, to furnish suitable support for her and had deserted her; that she was living apart from him for justifiable cause; that she prayed that such order be made for her support as the court deemed expedient; that process was duly issued out of the said court and served on this defendant and he duly appeared; that on or about March 21st, 1895, on motion of this defendant, the court ordered the plaintiff to file in that case full specifications as to *how, when and where she became the lawful wife of the defendant;* that pursuant to that order, on or about April 1st, 1895, the plaintiff filed in the said Probate Court her specifications, wherein she stated that she was married to this defendant on or about October 31st, 1884, in Brooklyn, New York, by John Courtney, Esq., Justice of the Peace, and further that a legal marriage according to the laws of the State of New York was entered into in that State between her and this defendant on or about April 15th, 1888, by mutual consent, consummation, acknowledgment and cohabitation in that State, and that such consent, acknowledgment and cohabitation continued in New York, and also in Massachusetts, from April 15th, 1888 to May 30th, 1891, at which time, she alleged, this defendant deserted her. She also stated in her petition in the Probate Court "that her marriage with this defendant was still—to wit, on April 1, 1895—of legal force and effect. Yet defendant deserted her on or

about May 30, 1891, and had contributed nothing to her support since that time." "Thereafter," the answer alleged, "this defendant, according to the course and practice of the said court, duly answered the said petition, and admitted that he and the said petitioner were married on or about October 30, 1884, in Brooklyn, by John Courtney, Esq., Justice of the Peace, and alleged that the said marriage had been duly adjudged to be null and void by this court by its judgment rendered April 9th, 1888, in the suit brought by this defendant against the plaintiff herein for the purpose of having the said marriage annulled, which is the same judgment hereinbefore in this answer, and also in the amended complaint herein referred to. In respect to the supposed marriage between this defendant and the plaintiff herein—alleged in the said specifications filed by the plaintiff in her said suit in the Probate Court to have taken place on or about April 15, 1888—this defendant answered that at the time of the said marriage performed on or about October 30, 1884, by John Courtney, Justice of the Peace, and both at the time of the alleged marriage stated in the specifications, filed by the said plaintiff, to have taken place April 15, 1888, and at all other times subsequent to, as well as long before October 30, 1884, the said plaintiff was the wife of one William G. Morrison, and that by reason thereof the said supposed marriages between this defendant and the said plaintiff by her alleged were, and each of them was, null and void. Thereafter such proceedings were duly had that the said cause came on to be heard and was heard by the said Probate Court upon the issues raised as aforesaid upon this defendant's said answer to the plaintiff's said petition, and the said court found the said issues for this defendant, and thereupon made its decree March 25, 1897, whereby the court found and decided that the prayer of the plaintiff's said petition *should not be granted* and adjudged that the said petition be *dismissed;* and that the said judgment remains of record, and in full force and effect."

In her reply the plaintiff, admitting that she had instituted

in the Massachusetts court the action above referred to, alleged that her petition in that case was one "for separate maintenance and that the issues involved in the present action were in nowise considered in that action . . . that said petition was dismissed upon the understanding that in case the relationship of husband and wife should be established between the plaintiff and the defendant by said Supreme Court, and upon the proceedings pending therein, the petition for separate support was to be renewed, and said judgment of said Probate Court, the County of Suffolk, Commonwealth of Massachusetts, entered on or about the twenty-fifth day of March, 1897, did not determine the questions at issue in the present proceedings, and was entered with leave to renew the said proceedings, as hereinbefore set forth."

There was a finding of facts in the present case by the Supreme Court of New York, one of which was that the plaintiff and the defendant were duly married before the Justice of the Peace as above stated, and that after such marriage they lived and cohabited together as husband and wife up to June 1st, 1891, and that she was never married to any person other than the present defendant. The court, by its final decree, set aside and vacated the decree of April 9th, 1888, annulling the marriage before the Justice of the Peace, and adjudged that the contract of marriage thus evidenced was in full force and effect. But that decree was affirmed by the Appellate Division. It is stated in the opinion of the Court of Appeals that there were several trials and appeals in this case to the Appellate Division. *Everett* v. *Everett*, 48 App. Div. 475; 75 App. Div. 369; 89 App. Div. 619.

Finally, the case was carried to the Court of Appeals of New York, where the judgment was reversed February 21st, 1905, 180 N. Y. 452, but, for reasons stated in the opinion of that court, the reversal was with directions to dismiss her complaint upon the merits. That decree is now here for review.

It appears from its opinion that the Court of Appeals of

New York adjudged the decision in the Probate Court of Massachusetts to be conclusive, as between the parties, as to the question whether the plaintiff was the wife of the defendant, entitled to be regarded as holding that relation to him. The Court of Appeals of New York said (p. 459): "The Massachusetts judgment was based upon the petition of the wife and it was founded upon the allegation that she was the defendant's wife; that he had deserted her and had failed to contribute to her support. These allegations of fact were put in issue by the defendant and must have been determined by the court. An exemplification of the judgment record in the action which annulled the marriage was presented to the Probate Court and admitted in evidence. The court had jurisdiction of the parties and the subject-matter of the controversy, and its judicial power extended to every material question in the proceeding. The determination of the court that the plaintiff was not entitled to the relief demanded in her petition must be deemed to have included the question as to the validity of her marriage. In other words, the court must have determined the question whether the petitioner was in fact the defendant's wife, and this involved an inquiry with respect to the question whether at the time of her marriage before the Justice of the Peace at Brooklyn she had another husband living. There was evidence before the court on that question, since the record of the judgment annulling the marriage in this State was before it. That judgment of a sister State was entitled in the present action to full faith and credit under the Constitution of the United States, any statute, rule or procedure or even any constitutional provision in any State, to the contrary notwithstanding. The provision of the Federal Constitution with respect to the force and effect to be given to the judgments of other States, and the act of Congress passed in pursuance thereof, is the supreme law of the land, and any statute or rule of practice in this State that would tend to detract or take from such a judgment the force and effect that it is entitled to under the Federal Constitution

and in the State where rendered must be deemed to be inoperative. So we think that that judgment was conclusive upon the parties to this action with respect to all the questions which were involved in the proceedings and decided by the court, and clearly one of those questions was the status of the present plaintiff. She alleged that she was the defendant's wife, and this allegation must be deemed to have been negatived by the decision in the proceeding."

The court, in addition, considered and disposed of some questions of a non-Federal nature in respect to which the trial court was held to have erred. But it thus concluded its opinion (p. 464): "There are many other questions in this case which have been discussed at length upon the argument and are to be found in the briefs of the respective counsel, but it is unnecessary to consider them. We think that the judgment must be reversed, and as there appears to be at least one conclusive obstacle to the plaintiff's success, a new trial would be useless, and so the complaint should be dismissed upon the merits." The one conclusive obstacle thus found to be in the plaintiff's way was the judgment of the Massachusetts court in the action brought by the plaintiff in error against the defendant in error.

Mr. Frank H. Stewart, for plaintiff in error, submitted:

The dismissal of the complaint by the state court was upon the ground that the action of the probate court in Massachusetts was a "conclusive obstacle" to the plaintiff's success. This involved the determination of the effect in Massachusetts of the action of said probate court, in accordance with § 1, Art. IV, of the Constitution and of § 905, Rev. Stat. See *Mills* v. *Duryee*, 7 Cranch, 481; *McElmoyle* v. *Cohen*, 13 Pet. 312, 326; *Crapo* v. *Kelly*, 16 Wall. 610, 619.

The determination by the courts of one State of the effect to be given to the judicial proceedings of a sister State is open to review by this court upon writ of error. *Huntington* v. *Attrill*, 146 U. S. 657.

Particularly when the highest court of a State has decided against the effect which it was claimed proceedings in another State had by the law and usage of that State. *Green* v. *Van Buskirk*, 7 Wall. 145. See also *Andrews* v. *Andrews*, 188 U. S. 28; *Crapo* v. *Kelly*, 16 Wall. 621; *Gt. West. Tel. Co.* v. *Purdy*, 162 U. S. 335; *Huntington* v. *Attrill*, 146 U. S. 684; *Harding* v. *Harding*, 198 U. S. 325.

That in the present case the New York court has given too great effect to the Massachusetts proceedings, instead of too little, does not render its decision any the less reviewable by this court. *Board of Pub. Works* v. *Columbia College*, 17 Wall. 521, 529; *Wood* v. *Watkinson*, 17 Connecticut, 500, 505; *Suydam* v. *Barber et al.*, 18 N. Y. 468, 472; *Warrington* v. *Ball*, 90 Fed. Rep. 464.

The state court erred in determining that the effect of the judicial proceedings in the probate court of Massachusetts was to render *res judicata* the issue raised by the complainant in this case.

The issue in this case is one which the probate court of Massachusetts did not and could not pass upon by actual decree, or affect by the legislative part of that decree. See Statutes of Massachusetts, chap. 153, § 33.

The issue in this case was not rendered *res judicata* by the judicial proceedings in Massachusetts.

It was not a fact which was, or could have been, litigated or decided in Massachusetts. See *Kerr* v. *Kerr*, 41 N. Y. 272.

The issue of this case was not a matter necessary to be determined by the Massachusetts probate court in the action taken by it.

The petition was simply dismissed. The ground for dismissal may have been any one of the grounds set up. There is nothing in the record to show that the Massachusetts court did not reach its result on some ground other than that which, it is contended, renders that result *res judicata*.

It cannot therefore be held, upon the face of the record, that there was identity of issues and resulting *res judicata*. *Umlauf*

v. *Umlauf*, 117 Illinois, 584; and see *Harding* v. *Harding*, 198 U. S. 337, 338.

It is clearly the law of Massachusetts, of New York, and the general law that, when a general result may have been reached by the determination of any undeterminate one of several facts, no particular fact is conclusively determined. *Stannard* v. *Hubbell*, 123 N. Y. 520; *House* v. *Lockwood*, 137 N. Y. 259; *Stokes* v. *Foote*, 172 N. Y. 327, 342; *Burlen* v. *Shannon*, 99 Massachusetts, 200; *Lea* v. *Lea*, 99 Massachusetts, 493; *Foye* v. *Patch*, 132 Massachusetts, 105, 111; *Stone* v. *Addy*, 168 Massachusetts, 26.

The issue of this case was not in fact a matter determined by the Massachusetts probate court.

The burden of proof was upon the husband, for it is the defendant who sets up the estoppel. *Vaughn* v. *O'Brien*, 57 Barb. 491, 495; *Foye* v. *Patch*, 132 Massachusetts, 105, 111; *Cromwell* v. *Sack*, 94 U. S. 351.

The issue in this case was not rendered *res judicata* because the alleged decree in Massachusetts did not import a decree on the merits.

The entry in the Massachusetts probate court, "Petition Dismissed" does not necessarily import a decree on the merits. And a consideration of the extrinsic evidence shows that there was a voluntary dismissal on the part of the wife at a time when she had a perfect right to dismiss her petition, which dismissal was acquiesced in by the husband and permitted by the court. The mere fact that the court did not see fit to grant her request that the decree should contain the customary technical words "without prejudice" is not conclusive upon her rights. *Lanphier* v. *Desmond*, 187 Illinois, 382; *Haldeman* v. *United States*, 91 U. S. 584.

And, since the decree purported only to deny to the wife affirmative relief, it did not bar a new application on her part for separate maintenance. *Buckman* v. *Phelps*, 6 Massachusetts, 448; *Pettee* v. *Wilmarth*, 5 Allen, 144.

For the Court of Appeals to hold the contrary was to deny

to the Massachusetts decree the effect which the wife claimed it had by law and usage in Massachusetts.

The issue in the present case arises on a different state of facts from the facts upon which the Massachusetts proceedings were predicated.

Mr. George Zabriskie for defendant in error:

In a suit of this character it is necessary in New York, as well as in the Federal courts, and elsewhere to allege and prove two distinct things: first, that the party complaining had a good defense on the merits to the claim upon which the judgment impeached was rendered; and second, that he was prevented from availing himself of that defense by the fraud of the other party. 2 Story, Equity, § 885*a*; *Blank* v. *Blank*, 107 N. Y. 91; *Whittlesey* v. *Delaney*, 73 N. Y. 571; *Kimberly* v. *Arms*, 40 Fed. Rep. 548; *White* v. *Crow*, 110 U. S. 183; *Ableman* v. *Roth*, 12 Wisconsin, 81; *Dobbs* v. *St. Joseph Fire Ins. Co.*, 72 Missouri, 189; *Williams* v. *Nolan*, 58 Texas, 708.

The judgment of the Court of Appeals proceeded upon two grounds, of which at least one presents no Federal question.

The judgment of the Court of Appeals rests quite as much upon their determination of the issue of fraud, which involves no Federal question.

In such a case this court will not assume jurisdiction. *Allen* v. *Arguimbau*, 198 U. S. 149; *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63; *Johnson* v. *Risk*, 137 U. S. 300; *Klinger* v. *Missouri*, 13 Wall. 257.

No Federal question is involved.

A right, privilege or immunity claimed under the Constitution must, under clause 3 of § 709 of the Revised Statutes of the United States, be claimed in the court below by the party seeking the advantage of it. *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491, 495; *Eastern Building & Loan Assn.* v. *Williamson*, 189 U. S. 122; *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 222.

Where the plaintiff in error claims merely that the state

court erroneously construed the judgment of a court of another State, without denying that the state court gave to the judgment the effect which such construction warrants, there is no question of faith and credit involved which this court has jurisdiction to review. *Allen* v. *Alleghany Company*, 192 U. S. 458; *Finney* v. *Guy*, 189 U. S. 335; *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491; *Banholzer* v. *N. Y. Life Ins. Co.*, 178 U. S. 402; *Lloyd* v. *Matthews*, 155 U. S. 222; *Glenn* v. *Garth*, 147 U. S. 360.

If upon any ground this court have jurisdiction, the judgment of the state court upon the plea of *res judicata* is right.

A final decree of a court of competent jurisdiction, upon the merits of the cause, is conclusive between the parties upon the material matters thereby necessarily determined. *Embury* v. *Connor*, 3 N. Y. 511, 552; *Dobson* v. *Pearce*, 12 N. Y. 156; *Prey* v. *Hegeman*, 98 N. Y. 351; *Griffin* v. *Long Island R. R. Co.*, 102 N. Y. 449.

Such being the ordinary rule of law there is no evidence in the record to indicate that in Massachusetts the decree of the probate court would be accorded any other or different faith or credit.

In ascertaining what credit is given to judicial proceedings in the State where they took place, this court is limited to the evidence on that subject before the court whose judgment is under review. *Tilt* v. *Kelsey*, 207 U. S. 43, 57.

The conclusiveness of the decree is not impaired by the fact that the cause of action in the suit in which the judgment was rendered is different from the cause of action in the suit at bar. *Doty* v. *Brown*, 4 N. Y. 71; *Lythgoe* v. *Lythgoe*, 75 Hun, 147; *S. C.*, 145 N. Y. 641.

In such instances the judgment is conclusive as to those matters in issue upon the determination of which the finding or verdict was actually rendered. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352, 353; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48, 49; *Bell* v. *Merrifield*, 109 N. Y. 202, 211.

The form of the proceeding does not effect the conclusive-

ness of the decree. The efficacy of the judicial determination attaches no less to summary, special or statutory proceedings, than to actions. *Culross* v. *Gibbons*, 130 N. Y. 447; *Reich* v. *Cochran*, 151 N. Y. 122; *Smith* v. *Zalinski*, 94 N. Y. 519; *Matter of Livingston*, 34 N. Y. 555.

The sufficiency of the proof upon which the court acted is not open to consideration where the judgment is pleaded as a bar or is relied on as evidence; otherwise the judgment would not be conclusive, and there could be no such thing as *res judicata*. *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 159; *Deposit Bank* v. *Frankfort*, 191 U. S. 449, 510; *Grignon's Lessee* v. *Astor*, 2 How. 319, 339; *Comstock* v. *Crawford*, 3 Wall. 396, 406.

MR. JUSTICE HARLAN, after making the foregoing statement, delivered the opinion of the court.

We have no concern about the disposition made by the state court of questions of mere local law, and have only to inquire whether, as required by the Constitution of the United States, it gave full faith and credit to the proceedings had in the Probate Court in Massachusetts. Const., Art. IV, § 1. If it did, the judgment must be affirmed; otherwise, reversed. That the proceedings in the latter court were judicial in their nature, and that the New York court intended to give them full faith and credit, cannot be doubted. The Probate Court is a court of record, established by the General Court of Massachusetts under the authority of the constitution of that Commonwealth. Const. Mass. 1822; Pub. Stat. Mass. 1882, p. 871, c. 156. It has jurisdiction when a wife for justifiable cause is actually living apart from her husband to make such order as it deems expedient concerning her support. *Ibid.* And when it has jurisdiction of the parties and subject-matter its decree, until reversed or modified, is as conclusive in Massachusetts as the judgments of other courts there. *Watts* v. *Watts*, 160 Massachusetts, 464; *Langhton* v. *Atkins*, 1 Pick. 535; *Dublin* v. *Chabourn*, 16 Massachusetts, 433.

In the suit in Massachusetts the fundamental fact was put in issue as to whether the plaintiff was the wife of the defendant and entitled, as such, to sue for support while living apart from her alleged husband. The New York court adjudged that, as between the parties, and, so far as the question before us is concerned, that fact had been determined by the Massachusetts court adversely to the plaintiff; for, the latter court ruled, after hearing the parties, that the relief asked from it should not be granted and dismissed the plaintiff's petition. So reads the record of the Massachusetts court.

It is said, however, that for aught that appears from the record of the Probate Court, as produced herein, that court *may* have declined to grant the relief asked by the alleged wife without considering at all the fact of her marriage, but only on the ground that she was living apart from the defendant without justifiable cause. But the answer to this contention is that the question whether the plaintiff was the lawful wife of the defendant, as well as the question whether she was entitled to separate maintenance while living apart from her alleged husband, were in issue in the Probate Court, and if, in order to prove that the court below gave undue faith and credit to the Massachusetts judgment, the plaintiff was entitled to show by oral testimony that there was really no dispute in the Probate Court as to the fact of her being the wife of the defendant, and that the only actual dispute at the hearing was whether she had justifiable cause for living apart from him, no such proof appears to have been made by her. No bill of exceptions as to the evidence in the Probate Court seems to have been taken, and we have before us only a record showing that the plaintiff, claiming to be the wife of the defendant herein, sued for separate maintenance and support, alleging that she was living apart from him for justifiable cause, and that the relief asked was denied and her petition dismissed without any statement of the specific grounds on which the court proceeded and without any qualifying words indicating that the decree was otherwise than upon the merits

EVERETT *v.* EVERETT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 1. Argued October 22, 1909.—Decided November 29, 1909.

Where the fundamental fact in issue in a suit by a wife for separate maintenance is whether there was a marriage, and the court having jurisdiction finds that the wife's petition should not be granted but should be dismissed, the courts of another State must, under the full faith and credit clause of the Constitution, regard such decree as determining that there was no marriage even though the husband may have asserted other defenses; nor can the wife, in a suit depending solely on the issue of whether there was a marriage, prove by oral

as to the issues made. We concur with the Court of Appeals of New York in holding that as the Probate Court had jurisdiction of the parties and the subject-matter, its judgment, rendered after hearing, that the plaintiff was not entitled to the relief demanded by her and that her petition be dismissed, it must be taken, upon the record of this case, that the latter court determined against the plaintiff the fact of her being the wife of the defendant at the time she sought separate maintenance and support.

It is doubtful whether the plaintiff, in her pleadings or otherwise, sufficiently asserted any right belonging to her under the Constitution of the United States. But if it were assumed that she did, the result, even upon that hypothesis, is that, upon the present showing by the plaintiff, there is no substantial ground to contend that the court below did not give such faith and credit to the judgment of the Probate Court of Massachusetts as were required by the Constitution, and, therefore, this court has no authority to review the final judgment of the New York court. The writ of error must be dismissed.

It is so ordered.